

D6DPUSA1

Trial

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 v.

12 Civ. 2826 (DLC)

6 APPLE, INC., *et al.*,

7 Defendants.

8 -----x

9 June 13, 2013

10 9:32 a.m.

11 Before:

12 HON. DENISE L. COTE,

13 District Judge

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Trial

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(In open court; trial resumed)

THE COURT: Good morning, everyone. Let me begin by telling you that I confirmed the times that I gave you last night and, therefore, the government has used so far 17 hours and 43 minutes, and Apple has used 19 hours and 56 minutes.

I also used the time to look at Miss McIntosh's declaration and reflect on the discussion that was raised with me at the end of the trial day yesterday about the government's decision not to cross-examine Ms. McIntosh, and I have a question for the government, but before I get to that question, let me just outline my understanding of the issues and some observations about them.

Apple argues that I need to have Ms. McIntosh here in the courtroom in order fairly to assess her credibility, and last night they made two principal arguments about why it's so important to have her in the courtroom for that purpose. One, to assess her credibility on the issue of whether Apple acknowledged that Random House could be on a wholesale arrangement with other retailers. Of course, that's reflected in a document, and it's described by Ms. McIntosh in paragraph 13 of her direct testimony.

The second, and as I understood less important, but nonetheless important issue from Apple's point of view was with respect to two conversations that Ms. McIntosh had with two Amazon employees and these, again, are reflected in documents.

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1 There is a conversation with Ms. Porco that's an e-mail
2 exchange in document DX278, and that's described in
3 Ms. McIntosh's direct testimony at paragraph 20. And then
4 there is an e-mail exchange with Mr. Naggar in DX281, and
5 that's described in Ms. McIntosh's direct testimony at
6 Paragraph 21.

7 Neither Ms. Porco nor Mr. Naggar discuss these
8 conversations in their direct testimony, but they were the
9 subject of cross-examination by Apple. So Apple chose to
10 question Miss Porco at length, I think we all remember that, I
11 certainly remember it clearly, on DX278, and there was
12 testimony elicited from Mr. Naggar about DX281.

13 So what does one conclude from this? First, that each
14 of these topics was anticipated by Apple and elucidated through
15 this witness in her direct testimony. Second, that each of
16 these topics is really premised principally on contemporaneous
17 documents. That's why anyone's probably, at this point, able
18 to talk about these conversations in any detail because what
19 they're really doing is explaining what happened in connection
20 with an exchange of e-mails.

21 So I've looked at Ms. McIntosh's direct testimony and,
22 overnight, again. So let me begin by asking the government.
23 In my view, the only unfairness to Apple here is if the
24 government plans to argue in summation that Miss McIntosh is
25 not a truth teller with respect to any statement in her

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1 affidavit on these topics. And the unfairness, I think, would
2 be that if they're going to make that argument in summation,
3 they should make it to her when she's on the stand, through
4 cross-examination, so that she has an opportunity to explain
5 herself.

6 So does the government plan to argue in summation that
7 she is not a truth teller with respect to any of the topics
8 outlined by Mr. Snyder last night?

9 MR. BUTERMAN: Lawrence Buterman for the United
10 States, your Honor. No, we do not.

11 THE COURT: So I have looked at her affidavit, as
12 well, and don't feel that there are any questions I need to put
13 to her. So if the government insists, Miss McIntosh would have
14 to come to court and swear to the truth of her affidavit. I do
15 not understand that they are insisting on that and, therefore,
16 her affidavit will be received as an exhibit at trial and as
17 representing her direct testimony.

18 MR. HEISS: Your Honor, just one point related to
19 that. We, in connection with Ms. McIntosh's declaration, would
20 offer DX281 in evidence. The government originally had a
21 hearsay objection to it, which I believe that they have now
22 withdrawn. So we would offer that in evidence.

23 MR. BUTERMAN: No objection, your Honor.

24 THE COURT: It's received.

25 (Defendant's Exhibit 281 received in evidence)

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1 THE COURT: Thank you, so much, counsel, for your
2 assistance on this. Okay.

3 MR. RYAN: Your Honor, Mark Ryan. We have the
4 unredacted version of those two pages from Professor Gilbert's
5 declaration that were accepted under seal. I'd like to hand
6 those up.

7 THE COURT: Thank you. They will be sealed.

8 MR. SNYDER: May I proceed, your Honor?

9 THE COURT: Yes. Dr. Gilbert? Dr. Gilbert, please
10 take the witness stand and I want to remind you, you are still
11 under oath.

12 THE WITNESS: Yes, your Honor.

13 RICHARD JOSEPH GILBERT,

14 called as a witness by the Plaintiffs,

15 having been previously duly sworn, testified as follows:

16 CROSS-EXAMINATION (Resumed)

17 BY MR. SNYDER:

18 Q. Good morning, Dr. Gilbert.

19 A. Good morning.

20 Q. Sir, I want to direct your attention to paragraph 145 of
21 your direct testimony, which Andy will put up on the screen.

22 Am I correct, sir, that in your report, you offered the Court
23 an opinion about consumer harm resulting from, allegedly, the
24 agency agreements at issue in this case?

25 A. If I might just take a moment to look at it.

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Gilbert - cross

1 Q. Well, without looking at the paragraph, sir, if you could
2 just tell the Court, is a component of your expert opinion, an
3 opinion that consumers were harmed as a result of the agency
4 agreements my client entered into with the five publishers in
5 January of 2010?

6 A. Yes.

7 Q. And am I correct that you base that conclusion in one --
8 paragraph 145, sir, by analyzing prices for the -- what you
9 call the defendant publishers' eBooks following agency; is that
10 correct?

11 A. If I may just look at the paragraph just to be sure?

12 Q. Well, let me just ask you, before you look at your report,
13 sir, do you know whether your consumer harm opinion is based on
14 just the prices for the publisher defendants' eBooks or for --
15 based on the price of eBooks throughout the relevant market in
16 the aftermath of my client's entry?

17 A. I would say yes to both.

18 Q. Didn't you acknowledge yesterday, sir, before we broke,
19 that you do not dispute Dr. Burtis' analysis that the average
20 price of eBooks in the relevant market across the market fell
21 following my client's entry into the eBook business?

22 A. I do not dispute that.

23 Q. So your consumer harm opinion is based on prices for the
24 defendant publishers' eBooks alone, correct?

25 A. No.

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Gilbert - cross

1 Q. Well, let's look at 145 of your declaration. Well, let me
2 ask you this question, sir. Would you agree that price
3 increase by itself is not anticompetitive, as an economist
4 looking at markets?

5 A. I would agree with that statement in its isolation.

6 Q. Right. And would you agree that even an infinite price
7 increase is not anticompetitive by itself?

8 A. Not in isolation.

9 Q. Now, did you offer an opinion yesterday, sir -- Let me
10 withdraw 145 and move on.

11 Did you offer an opinion yesterday, sir, -- well,
12 withdrawn.

13 Let me direct your attention briefly to the price caps
14 in the Apple agency agreements. Your report discusses those,
15 correct?

16 A. Yes.

17 Q. And those are the price caps in Apple's agreements with the
18 five publishers, correct?

19 A. Yes.

20 Q. And you know that those price caps apply only to New York
21 Times best sellers and hardcover new release eBooks, correct?

22 A. My understanding is the price caps have certain differences
23 among the contracts, some of them may apply to new releases in
24 any form, even a paperback. Most of them apply to hardcover
25 new releases.

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Gilbert - cross

1 Q. And are you aware, sir, that the eBooks that are the focus
2 of this case, namely, hardcover new releases, including
3 New York Times best sellers, represent only ten percent of the
4 paid eBooks sold in your alleged relevant market; are you aware
5 of that?

6 A. That depends on the moment of time that you're looking at.

7 Q. Does that seem, though, to be a good approximation of the
8 percentage of paid eBooks represented by that category of
9 eBooks, that is, hardcover new releases, including the New York
10 Times best sellers that were subject to the price caps?

11 A. I haven't done the calculation. I would expect that in
12 recent times I wouldn't have reason to dispute that figure.

13 Q. And having not done the calculations, you have no basis, do
14 you, to dispute Dr. Burtis' conclusion in paragraph 6 of her
15 declaration that the books we're talking about, that small
16 category represented only 10 percent of the paid eBooks in the
17 relevant market?

18 A. I haven't verified the calculations; so I don't dispute it,
19 but I haven't verified it either.

20 Q. And, therefore, you cannot dispute that 90 percent of all
21 eBooks sold in the relevant market alleged by the Department of
22 Justice were not subject to either the MFN or the price caps,
23 correct?

24 A. For the same reason.

25 Q. Right. And you would agree, just on the subject of price

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Gilbert - cross

1 caps, that the price caps in the agency agreements constrained
2 the publishers from setting higher prices for those books on
3 the Apple bookstore?

4 A. I believe the publishers wanted higher prices; so -- and
5 according to my analysis, with the prices at or near the price
6 cap, I think that's a reasonable conclusion.

7 Q. It's a reasonable conclusion that the price caps had the
8 effect of constraining the ability of the publishers to set
9 higher retail prices than they otherwise would, correct?

10 A. For those books that were subject to the price cap.

11 Q. Now, finally, sir, am I correct that you offered an opinion
12 in your report about what I call windowing, but you called
13 withholding of the eBooks?

14 A. It depends upon which opinion. I mean, windowing and
15 withholding are different concepts. I've addressed both
16 concepts in the report.

17 MR. SNYDER: Can we, Andrew, please, call the witness'
18 attention to yesterday's trial transcript, Page 1613, Lines 13
19 to 1614, Line 6.

20 Q. Sir, do you recall before the break me asking you these
21 questions and you giving these answers:

22 "Q. Apple's entry into the eBook business on -- with a
23 dedicated eBook store was a significant event in the nascent
24 eBook industry, correct?

25 "A. I would agree it was perceived at the time --

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Gilbert - cross

1 "Q. Thank you.

2 "A. -- as a significant event.

3 "Q. And as things stood in late January, Apple was going to
4 have all new releases on a brand new tablet device, correct?

5 "A. I'm sorry, say that again, please."

6 I repeated the question, and your answer was:

7 "A. That was an understanding, yes, I believe.

8 "Q. And if Amazon stayed in its existing business
9 relationships with the publishers, that is wholesale with
10 either actual or threat of windowing, that could pose to Amazon
11 a competitive risk, correct?

12 "A. Only if that withholding were a credible threat, and I
13 felt it was -- I do not feel that it was not."

14 A. I think I said --

15 MR. RYAN: Objection, your Honor.

16 Q. I think you meant, I do not feel that it was, is what
17 you're saying, a credible threat, correct?

18 MR. RYAN: Objection.

19 A. I think --

20 THE COURT: Wait one minute.

21 MR. SNYDER: I was flustered by the objection.

22 THE COURT: Yes.

23 MR. SNYDER: I withdraw the last question, and I'm
24 going to ask a new one.

25 Q. Sir, can you read your answer and then tell the Court what

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Gilbert - cross

1 your answer is so we can have clarity on the record?

2 MR. RYAN: Objection, your Honor.

3 Q. Can you read your answer, please, out loud, sir?

4 THE COURT: Well, I think I'm going to try to capture
5 what Mr. Snyder wants to achieve here. I'm going to place the
6 last question to you again. If you could, answer that, please.

7 And if Amazon stayed in its existing business
8 relationships with the publishers, that is wholesale with
9 either actual or threat of windowing, that could pose to Amazon
10 a competitive risk, correct?

11 A. My answer is only if that withholding were a credible
12 threat, and I felt it was -- I do feel that it was not.

13 Q. So it's your testimony that you did not feel that Amazon,
14 as an economic actor, believed that withholding was a credible
15 threat, yes or no?

16 A. I don't know what Amazon believed. Whether the threat was
17 credible depends upon whether the entity that is making the
18 threat is prepared to carry it out, and I addressed it in that
19 sense.

20 Q. I'm just trying to understand your testimony. Yes or no,
21 is it your testimony that you do not believe that windowing in
22 late January 2010 was a credible threat?

23 MR. RYAN: Objection.

24 A. I believe it was not a credible threat.

25 Q. Thank you.

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Gilbert - cross

1 THE COURT: Overruled.

2 Q. And in coming to the conclusion that the threat of
3 windowing was not credible in January of 2010, did you review
4 documents in the case concerning Amazon's reaction to the
5 concept of withholding or windowing of books?

6 A. I reviewed a number of documents.

7 Q. Did you consider -- who's the CEO of Amazon?

8 A. Mr. Bezos.

9 Q. And did you consider whether Mr. Bezos, for example, as the
10 CEO, thought that windowing was a credible competitive threat
11 to Amazon's business?

12 A. I don't recall.

13 Q. Let me show you Plaintiff's Exhibit 146, which I'll offer
14 in evidence.

15 MR. SNYDER: And I'll hand that up to the Court, and
16 distribute to counsel and the witness.

17 THE COURT: Any objection?

18 MR. RYAN: It's in, your Honor.

19 THE COURT: Thank you.

20 Q. Did you review this document, sir, before coming to your
21 expert conclusion that windowing was not a credible threat?

22 A. I may have, but I don't recall.

23 Q. And was it not relevant to your determination that,
24 according to Brian Murray's e-mail of January 31, 2009, Amazon
25 was warning nuclear war if publishers delay eBook publication

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Gilbert - cross

1 date? Have you ever seen that before?

2 A. I vaguely recall that, but I don't know if I saw it in this
3 document.

4 Q. Thank you. Let's go to the next exhibit, Defendant's
5 Exhibit 23.

6 THE COURT: I'm sorry. This document is from July of
7 '09?

8 MR. SNYDER: Yes, your Honor.

9 THE COURT: Okay. PX146?

10 MR. SNYDER: Yes, your Honor. It is.

11 THE COURT: Okay.

12 Q. Have you seen Defendant's Exhibit 23, sir, which includes
13 an e-mail from April of 2009 from Jeff Bezos to Laura Porco and
14 others at Amazon regarding a Kindle meeting with Markus Dohle,
15 CEO of Random House?

16 A. I don't recall it. I may have seen it. I don't recall it.

17 Q. And so then you don't recall whether Mr. Bezos told Laura
18 Porco and others in April of 2009 that, on the subject of
19 delaying the eBook, "that would be an absolute declaration of
20 war, terrible customer experience, embarrassing to us in front
21 of customers; the simple fact is we couldn't tolerate it. It
22 would be better off to just not carry their books"? Do you see
23 that?

24 A. I see it, yes.

25 Q. Did you do any investigation of whether Amazon's views

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Gilbert - cross

1 about windowing changed between the time Mr. Bezos said in
2 April 2009 that the delaying of an eBook would be an absolute
3 declaration of war, to late January of 2010?

4 A. Are you -- just to clarify, are we talking windowing or
5 withholding?

6 Q. Delaying the eBook for a period of time on the Kindle
7 platform, as several publishers were then doing, and four had
8 threatened by the end of January 2010, which we established
9 yesterday?

10 MR. RYAN: Objection.

11 THE COURT: Sustained.

12 Q. Didn't we establish yesterday your understanding that four
13 of the six major publishers had, prior to Apple entering the
14 scene, already either started windowing or threatening
15 windowing; that is, delaying the eBook on the Kindle, the NOOK
16 and other platforms?

17 A. It is my understanding that there were sporadic instances
18 of windowing.

19 Q. Right. And including some of the very top new releases of
20 some of the top publishing houses in the world, correct?

21 A. Yes. I understand, over this period, it's my understanding
22 there were 37 titles that were windowed.

23 Q. And you understood, did you not, that under the contracts
24 that were negotiated between Amazon, on the one hand, and the
25 publishers, on the other, the publishers had the absolute

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Gilbert - cross

1 contractual right to delay books on any platform if the
2 publishers saw fit, correct?

3 A. That is my understanding.

4 Q. All right. So my question to you is, sir, in coming to
5 this Court and telling the Court that you thought windowing in
6 January of 2010 was not a credible threat, did you investigate
7 whether Mr. Bezos' view in November -- in April of 29 --
8 withdrawn.

9 In rendering your opinion that windowing was not a
10 credible threat in January of 2010, did you investigate whether
11 Amazon's view that delaying an eBook would be an absolute
12 declaration of war changed in any way between the spring of
13 2009, when it was expressed, and January of 2010?

14 A. I certainly considered that.

15 Q. And do you have evidence that you can point to the Court, a
16 document or testimony, where Amazon's view that the withholding
17 of books was an absolute declaration of war, was any different
18 in January of 2010 than it was in June of 2009?

19 A. My view is that Amazon reacted strongly. You know, whether
20 it's a formal declaration of war or not to withholding threats,
21 and that was something they reacted to over this time period,
22 that they didn't like it, they objected to it, it was
23 discussed.

24 How their thinking may have progressed over this time
25 period, I think, is really something that Mr. Bezos has to

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Gilbert - cross

1 testify to, but my view is that they objected to windowing,
2 withholding over this time period.

3 Q. Right. And you have no evidence that you can point to this
4 Court -- withdrawn.

5 You reviewed extensive testimony in preparing your
6 hundreds of pages of reports in this case, correct?

7 A. Yes.

8 Q. And you had a staff working for you, correct?

9 A. Yes.

10 Q. How many people worked for you in reviewing reports and
11 documents leading up to the creation of your report?

12 A. Several. I don't know the exact number.

13 Q. More than five?

14 A. Probably about five. I don't know if there were more or
15 less.

16 Q. And for how long did you work with that team, how many
17 months, in preparing your report, reports?

18 A. Oh, many months, probably eight months or so.

19 Q. So you had a team of five people for as much as eight
20 months reviewing the evidence in this case, correct?

21 A. Yes.

22 Q. Can you point to a single document or a single piece of
23 testimony, sir, that demonstrates that Amazon's view in
24 April 2009, that delaying the eBook would be an absolute
25 declaration of war, changed in any way between April 2009 and

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Gilbert - cross

1 January of 2010, yes or no?

2 A. I could not point to a document.

3 Q. Yes or no --

4 A. I don't think it did; so that's -- I think that's what I
5 said.

6 Q. Is the answer yes or no to my question, sir?

7 A. No, I'm not aware of a document to that effect.

8 MR. SNYDER: Thank you. No further questions.

9 REDIRECT EXAMINATION

10 BY MR. RYAN:

11 Q. Good morning, Dr. Gilbert.

12 A. Good morning.

13 Q. As a professional economist, are you familiar with the term
14 confounding factor?

15 A. Yes.

16 Q. What is a confounding factor?

17 A. Usually it arises in statistical analysis where when you're
18 trying to determine whether one variable causes another
19 variable or is causally related to another variable, you have
20 to take into account all the other variables that might
21 confound that relationship, and that's what we call confounding
22 factors.

23 Q. And do you recall you were asked questions yesterday about
24 Dr. Burtis' pricing analyses in this case?

25 A. Yes.

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Gilbert - redirect

1 Q. Now, if at all, in your opinion, did Dr. Burtis account for
2 confounding factors in her analyses?

3 A. I don't think she did any analysis whatsoever of
4 confounding factors.

5 Q. And, in your opinion, what would a failure to account for
6 confounding factors have as to the -- on the reliability of her
7 work?

8 A. Well, it can certainly lead an analyst to go astray in very
9 significant, really fatal ways because the issue is if you're
10 trying to understand how a particular event or conduct has
11 affected the marketplace, markets are affected by many events
12 and many types of conduct, and you're trying to unravel that
13 relationship and to not try to control for these confounding --
14 other confounding factors, it can lead you to a conclusion
15 that, for example, prices went down for eBooks for reasons that
16 have nothing whatsoever to do with the Apple agency agreements.

17 Q. Now, would you turn to Page 51 of your declaration, please,
18 your written testimony, and take a look at figure 3. Let me
19 know when you have it. That was Page 51, figure 3?

20 A. I have it.

21 Q. Now, looking at figure 3, is that information depicted in
22 figure 3 important to your opinions in this case?

23 A. Yes, indeed.

24 Q. Could you tell us, briefly, why figure 3 is important to
25 the opinions that you've rendered in this case?

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Gilbert - redirect

1 A. Figure 3 shows very clearly that following the sale of the
2 iPad and the launch of the iBookstore on April 3rd or 4th -- it
3 depends, this identifies the week of April 4th, the launch was
4 April 3rd of 2010 -- the four publishers who went on agency
5 immediately, which were Hachette, HarperCollins, Macmillan and
6 Simon & Schuster, immediately raised their prices and those
7 prices had a durable increase from April 2010 through the time
8 period in this figure, which goes to January 2011.

9 You can do all kinds of statistics, but really, all
10 you need to do is look at the diagram and then in, I believe it
11 was, May, the end of May when Penguin moved to agency, exactly
12 the same thing happened. Their prices went up and stayed up.
13 So it's not rocket science. You just have to look at it.

14 MR. RYAN: Thank you.

15 THE COURT: Mr. Snyder?

16 MR. SNYDER: Nothing further, your Honor.

17 THE COURT: Thank you. If you could go to paragraph
18 55 of your direct testimony. Well, I guess it's 54 where this
19 first comes up. You indicate there that Apple wanted a
20 significant 30 percent gross margin on its sales of eBooks. I
21 just want to make sure that I understand correctly that that's
22 nothing more than a statement that the agency agreements gave
23 Apple a 30 percent gross margin on the eBook sales rendered
24 through the iBookstore.

25 THE WITNESS: Yes, your Honor. I inferred that from

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Gilbert - redirect

1 the agency agreement.

2 THE COURT: Okay. And then in paragraph 55, you
3 continue to earn a 30 percent gross margin on a 9.99 eBook,
4 Apple would have to pay a wholesale price no greater than \$7,
5 well below the prevailing wholesale prices for just-released
6 and best selling eBooks. Of course, the agency agreements were
7 not actually the purchase of an eBook by Apple on a wholesale
8 basis?

9 THE WITNESS: That's correct.

10 THE COURT: So as an economist thinking about these
11 financial transactions, however, you are converting the amount
12 that Apple paid under an agency agreement for the role of
13 acting as a distributor into -- equating it for these purposes,
14 into a wholesale model?

15 THE WITNESS: That's correct. You're right.
16 Technically, it's not legally that. It's what they give to the
17 publisher, which is like a wholesale price.

18 THE COURT: Now, you made a distinction several times
19 in your testimony yesterday and today between withholding and
20 windowing.

21 THE WITNESS: Yes, your Honor.

22 THE COURT: So why don't you explain that distinction?

23 THE WITNESS: Windowing refers to a decision not to
24 sell books of a certain category, a format. For example,
25 publishers routinely window paperback books. They'll come out

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Gilbert - redirect

1 with a hardcover and then the paperback, and they do that
2 because some people want the book right away. They're willing
3 to pay more for the hardcover, and so they charge a high price
4 at the beginning, and then a lower price in the end. It's
5 called price discrimination, and it's just a way to make more
6 money.

7 Withholding refers to not allowing a particular
8 retailer to sell that book, and that was the threat that was at
9 issue here, was to withhold books from Amazon. I found -- it
10 was my view that windowing of eBooks was not a profitable
11 conduct, if I might point that out, because unlike paperbacks
12 and hardback books, there was no reason not to sell an eBook.
13 They were making money on these eBooks. By not selling them,
14 they would just lose the money.

15 There really wasn't much competition between eBooks
16 and printed books that I could see. So the question is what is
17 the withholding threat? And that was what I was addressing in
18 my analysis. Was it profitable? Was it credible for the
19 publishers to withhold books from Amazon?

20 THE COURT: And why did you think -- Well, did it ever
21 become credible, in your view, for a publisher to threaten to
22 withhold eBooks from Amazon?

23 THE WITNESS: My view is that withholding, by itself,
24 was not a credible threat and would not have been a credible
25 threat because even if the expectation was that Apple and

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Gilbert - redirect

1 Barnes and Noble and other e-retailers would be a large
2 fraction of the market, withholding books from Amazon, who was
3 always going to be a large fraction of this market, would mean
4 inevitably a lot of your books wouldn't get sold and that's
5 costly, more costly, and that's why I thought it was a game of
6 chicken. I didn't think that the publishers really wanted to
7 do this.

8 Now, it changed with the MFN because with the MFN, not
9 only -- if Amazon stays on wholesale and you have an MFN, and
10 if Apple and Barnes and Noble are agency, and you have at least
11 the expectation of a large share of the market, being
12 objective, by the pricing parity in the MFN, then if Amazon is
13 selling books at 9.99, and delivering to the publisher a much
14 larger wholesale price, often 12.50 for a 9.99 book, now you go
15 through the price parity provisions of the MFN. You go to
16 Apple and Barnes and Noble. You still need that book at the
17 retail price of 9.99, which the publisher didn't want at all,
18 and they're not getting 12.50 for that book, they're getting
19 \$7 for that book. And that is a important factor that, in my
20 view, greatly reinforced the decision to withhold books.

21 THE COURT: To what extent is the -- and I'm going to
22 ask you to assume here there was an agreement for concerted
23 action by a group of publishers to make the same withholding
24 threat at the same time, change your analysis.

25 THE WITNESS: Your Honor, I want to make sure I

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Gilbert - redirect

1 understand your question. So to what extent was there an
2 assumed agreement? I just want to be sure.

3 THE COURT: If you assume that five publishers -- Let
4 me change it. Let's assume that four of the Big Six
5 publishers, at the same moment in time, threatened to withhold
6 books. Does that change your analysis in any way? Threaten to
7 withhold books from Amazon.

8 THE WITNESS: It could in the sense that, as I say,
9 it's a game of chicken because the publishers -- without the
10 reinforcement of the MFN, the publishers really wanted their
11 books sold at Amazon and, of course, Amazon wanted the books to
12 be sold. If four publishers got together and committed
13 themselves to withholding, it's an outcome that they wouldn't
14 like, but it might put so much pressure on Amazon that Amazon
15 would have to -- would have to cave to that.

16 That's a complicated dynamic, and it's one that I
17 think I would have to say let's look and see what the record
18 shows because it's a bargaining game in which neither side
19 wants that outcome. So it's hard to say how credible it really
20 is. I, as an economist, I prefer to analyze situations in
21 which people make credible threats, threats that they would
22 actually carry out on, as opposed to ganging up to make
23 incredible threats.

24 THE COURT: So let me now tweak the hypothetical.
25 Assume that four publishers have agreed to withhold books from

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Gilbert - redirect

1 Amazon, but they have an MFN clause in an agency agreement with
2 Apple. Does that change your analysis of the effect of the
3 withholding threat?

4 THE WITNESS: It definitely does for the reasons that
5 I explained because the MFN -- one way of thinking about it is
6 the MFN adds financial injury, namely getting \$7 for this 9.99
7 book, to what the publishers consider to be the insult of
8 selling a book at 9.99. So you take that and combine it with
9 the fact that this MFN now applies to a larger share of the
10 market with the expected entry of Apple, and it becomes a much
11 more important threat and more credible threat.

12 THE COURT: I believe you testified that -- yesterday
13 that the publishers had incentives to move Amazon to an agency
14 relationship, and do I understand that correctly to be a
15 reference, your testimony yesterday, I don't think it was
16 developed at that portion of your testimony, that that
17 incentive came from the MFN?

18 THE WITNESS: Yes, that's correct, to avoid the
19 circumstance that I just explained.

20 THE COURT: Now, yesterday, I believe you testified
21 that the withholding threat had been mooted by the time that
22 Barnes and Noble executed agency agreements with publishers
23 that contained an MFN. Did I understand that correctly?

24 THE WITNESS: I think that's correct. At that point,
25 at least my understanding of the chronology is that by that

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Gilbert - redirect

1 point, Amazon had agreed to go to agency. Certainly these
2 publishers, and by then Barnes and Noble, was going to go to
3 agency. That was in their interest as well; so it was -- the
4 threat period was -- seemed to be over at that point.

5 THE COURT: Okay. Now, you were asked this morning
6 whether you disagreed or not with the calculation that the
7 average price of eBooks fell after Apple entered the eBook
8 market and opened the iBookstore.

9 THE WITNESS: Yes.

10 THE COURT: But you've also testified that it is your
11 belief that consumers were harmed after Apple entered the
12 market, the eBook market, from the perspective of either the
13 relevant market or a subset of the perspective of the eBook
14 prices from defendant publishers. Do I understand that
15 correctly?

16 THE WITNESS: Yes, your Honor.

17 THE COURT: And would you explain why you believe
18 consumer harm existed from either of those perspectives, even
19 though you do not disagree that, as a matter of calculation,
20 the average eBook price fell after Apple entered the eBook
21 market?

22 THE WITNESS: Yes, your Honor. eBooks are an example
23 of what economists call differentiated products. They're not
24 commodity products like gasoline or wheat or coal or something
25 like that. When you have differentiated products, you expect

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Gilbert - redirect

1 products to be sold at different prices, different qualities,
2 but they're all still in the market. In fact, most markets are
3 differentiated products.

4 And when you look at price impacts in a differentiated
5 product market, you have to pay attention to the mix of product
6 that are being sold. Computers are sold in different price
7 categories and price points. Handset cell phones are set at
8 different price points and different categories. Cars, we
9 still have a car market. We have a handset market. We have a
10 personal computer market. But there are different types of
11 products that are being sold in that market.

12 Now, you can have conduct that effects some of those
13 products in the market, and it can raise the price of those
14 products and, yet, it's still very possible for the average
15 price to fall in those markets. So, for example, suppose
16 people got together and suppose Ford and Chevrolet and General
17 Motors, Toyota agreed to raise the price of certain higher-end
18 automobiles, maybe the options on certain automobiles.

19 Now, maybe because gas prices go up, people buy
20 smaller cars. Smaller cars tend to be cheaper. So over time,
21 the price of cars, if you look at the whole market, the average
22 price may go down, but that doesn't mean that there was not
23 conduct to raise the price of certain types of cars. And in
24 evaluating that conduct, you'd want to focus on the particular
25 cars whose prices were raised and not simply say, well, because

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1 other cars came into the market and they were cheaper cars,
2 that somehow offset it.

3 I mean, similarly, there's been many allegations of
4 unlawful conduct raising the price of disk drives. Well, over
5 time technological progress has moved the price of computer
6 disk drives from \$5,000 down to, you know, \$100 or less for a
7 disk drive. Phenomenal technological progress for disk drives,
8 but it's still the case that there were periods of time where
9 there was collusion, or at least alleged collusion, in the disk
10 drive market. The fact that there were new products coming on
11 the market that were cheaper doesn't mean that that conduct
12 didn't harm consumers.

13 Here, you have clear evidence that certain titles went
14 up in price, the new release New York Times best sellers by the
15 defendant publishers. The evidence is very clear. It's also
16 clear that their backlist titles went up, too, often even more
17 than the frontlist titles. The fact that a lot of independent
18 publishers came onto the market and were selling books at 2.99
19 is just another confounding factor. It doesn't offset this
20 conduct because it would have happened without regard to this
21 conduct. So you really have to unravel those different
22 incidental factors.

23 THE COURT: Is another way of thinking about it that
24 if there hasn't been any control or analysis presented by
25 Dr. Burtis, of whether the average price would have fallen even

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Gilbert - redirect

1 more without the alleged conspiratorial activity?

2 THE WITNESS: Yes, your Honor, that's another way of
3 looking at it. If all those other factors were controlled for,
4 and it's my understanding that that's what Professor
5 Ashenfelter was trying to do, then, yes, that the prices would
6 have fallen even more than they did.

7 THE COURT: Now, you've talked about five people on a
8 team working for eight months. That's a pretty extraordinary
9 effort. Are you suggesting that they worked full time on this
10 project alone for eight months?

11 THE WITNESS: No. No, your Honor.

12 THE COURT: And this sort of circles back to something
13 you've just been describing to me, but when you talk about
14 confounding factors and a lot of individually published books
15 at this lower price point, are you familiar with the term
16 disintermediation?

17 THE WITNESS: Yes, your Honor.

18 THE COURT: And what does that mean to you?

19 THE WITNESS: It means when a -- I'd say generally
20 when a firm that is at a particular stage in a production
21 cycle, may move into another vertically related stage of the
22 production cycle. So a retailer, for example, might move
23 upstream to get more into manufacturing, that would be referred
24 to as disintermediating the function of the manufacturer. And
25 here I refer to it in the context of an e-retailer moving

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Gilbert - redirect

1 upstream to publishing.

2 THE COURT: And can it also be an author directly
3 publishing their books through the facility of technology made
4 available by either Apple or through arrangements that Amazon
5 made available, for instance, in December of 2009, or at least
6 announced then, so that the publisher was no longer essential
7 to the author in getting its books to market?

8 THE WITNESS: Absolutely, your Honor. I should
9 clarify. Disintermediation can come about by moving upstream
10 or downstream. So that would be an example of going from the
11 upstream activity to more downstream, as publishing.

12 THE COURT: Okay. Does the government have any
13 additional questions to place to Dr. Gilbert based on the
14 questions I've asked of him?

15 MR. RYAN: Just a couple, your Honor.

16 REDIRECT EXAMINATION

17 BY MR. RYAN:

18 Q. Dr. Gilbert, you were asked about consumer harm and you
19 talked about prices. In your professional opinion, if in one
20 of these differentiated product markets items at the high end
21 went up in price and, as a result, consumers purchased items at
22 the lower end rather than the higher end, is that a form of
23 consumer harm?

24 A. Yes, indeed.

25 Q. And did you identify such consumer harm in this case?

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Gilbert - redirect

1 A. Yes. Consumers are going from their more preferred
2 products to a lesser preferred product, that's consumer harm.

3 MR. RYAN: Thank you.

4 MR. SNYDER: Yes, your Honor.

5 RECROSS EXAMINATION

6 BY MR. SNYDER:

7 Q. Dr. Gilbert, I have a few questions to follow up on the
8 Court's questions.

9 The first question is you asked -- the Court asked you
10 about incentives stemming from the MFN on the publishers. Do
11 you recall those questions?

12 A. Yes.

13 Q. Just to make sure, you did testify yesterday, did you not,
14 that the publishers had incentives to move Amazon to agency
15 before Apple first entered the scene? Do you remember that
16 testimony you gave?

17 A. Well, they certainly had an incentive to get a higher
18 price, and one way to do that was through an agency
19 relationship.

20 Q. Okay. So you acknowledged yesterday, did you not, that,
21 for example, Hachette had incentive to move its resellers to an
22 agency model before Apple entered the scene, correct?

23 A. I don't recall the exact testimony, but I know there were
24 some discussion of that. As I pointed out in my witness
25 statement, if you look at an individual publisher, individual

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Gilbert - recross

1 publisher moving books, for example, from 9.99 to 12.99 would
2 not be profitable, and while they might have wanted to do that,
3 it probably would not have been profitable for them to do that
4 on a unilateral basis.

5 Q. I understand that, but let's take an individual publisher
6 had an incentive before Apple entered the scene to move Amazon
7 to agency and Barnes and Noble to agency, whether they could
8 accomplish it on their own or not, correct?

9 A. No, I think I would disagree.

10 Q. And do you recall testifying to the contrary yesterday?

11 A. I guess I'd have to look at my testimony to be sure.

12 Q. So --

13 A. Because it wouldn't be profitable.

14 Q. And you agree, sir, do you not, that all trade eBooks are
15 more or less substitutable?

16 A. More or less. Some more than others.

17 Q. As differentiated products, correct, one 6.99 book could
18 be --

19 THE COURT: You're about to insult every reader in
20 America, Mr. Snyder. No, I'm just kidding. To say nothing of
21 authors. But I'm sorry.

22 Q. As an economic matter, you were talking about economics,
23 right, when you were answering the Court's question about
24 interchangeability and substitutability, correct?

25 A. Well, I think the Court's question referred to

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Gilbert - recross

1 differentiated products. They are differentiated products,
2 more or less substitutable.

3 Q. You know, I'm not asking about the quality of the book,
4 correct, but as an economic matter, whether all trade eBook
5 titles are reasonably substitutable for one another as an
6 economic matter?

7 A. Differentiated products involve quality as well as price.
8 People perceive these -- you know, you have loyal Toyota
9 customers, you have people who want to buy Fords. There's
10 still differentiated products. Some people have more or less
11 attachments to one than the other. Some people are going to be
12 more interested in certain authors and less in others. That's
13 the way it works.

14 Q. Before I ask you my final question, I just want to confirm.
15 You agree, do you not, that as differentiated products, all
16 trade eBooks are more or less substitutable?

17 A. More or less, yes.

18 Q. Finally, I'd like to show you your testimony yesterday at
19 Page 1614, Line 19 to 1615 Line 3. This is in response to the
20 Court's questions about the MFN in the Apple agency agreements.
21 Do you remember me asking you this question and giving this
22 answer:

23 "Q. And that's precisely why, sir, you, as the government's
24 economist, have not ruled out the possibility that other
25 factors, factors other than Apple's MFN, might have led Amazon

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Gilbert - recross

1 to make the business decision to restructure its business
2 relationships with the publishers, correct?

3 "A. I have not ruled out other possible explanations, other
4 than the explanations that I think are, in fact, the most
5 likely explanations. You know, whether that description that
6 you gave me was precisely the reason, I'm not sure that's
7 correct, but I have not ruled out other explanations."

8 Do you recall that question?

9 MR. RYAN: Objection.

10 A. Yes.

11 THE COURT: Overruled.

12 Q. Am I correct, sir, that nothing that you said to Judge Cote
13 in response to her question changes your sworn testimony
14 yesterday, that you have not ruled out the possibility of other
15 explanations other than the MFN as you testified yesterday?

16 Does it change your testimony?

17 A. It does not change my testimony.

18 Q. Thank you.

19 A. I would just like to clarify.

20 MR. SNYDER: Your Honor?

21 A. May I just clarify the response?

22 MR. SNYDER: Your Honor?

23 THE COURT: Excuse me.

24 MR. SNYDER: Your Honor, every other witness has been
25 required to answer yes or no, just about, and this witness

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Gilbert - recross

1 continues to not answer my questions yes or no.

2 MR. RYAN: I --

3 THE COURT: Actually, Mr. Snyder, I think this witness
4 has been very responsive, but I will let him and his answer at
5 this point. The government may or may not ask further
6 questions.

7 MR. SNYDER: Thank you, Judge.

8 THE COURT: Anything further, Mr. Snyder?

9 MR. SNYDER: Yes.

10 BY MR. SNYDER:

11 Q. You talked about a bargaining game in discussing -- in
12 describing what was going on between Amazon, on the one hand,
13 and publishers, on the other. Do you remember -- Do you
14 remember that discussion?

15 A. There is -- There is a, certainly, I will say, an
16 interaction that one might characterize as a bargaining of some
17 type, yes.

18 Q. You say one might characterize. You told this Court that
19 it was, in fact, a bargaining game, correct? That's how you
20 described it. Those were your words, correct?

21 MR. RYAN: Objection.

22 A. I believe I've used something -- words to that effect.

23 Q. And when you meant bargaining game, you meant a negotiation
24 between two parties, correct?

25 A. Well, at least two parties.

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Gilbert - recross

1 Q. Right. And as an economist, putting aside the Judge's
2 hypothetical about concerted action, as an economist, would you
3 agree that a bargaining game is not anticompetitive; that is
4 parties negotiating in a free market based on their economic
5 interests?

6 A. Of course it depends on the context.

7 MR. SNYDER: Nothing further.

8 THE COURT: And, Mr. Snyder, I want to apologize for
9 interrupting your examination.

10 MR. SNYDER: No apologies needed. Thank you.

11 THE COURT: I very much regret that I did. Mr. Ryan?

12 REDIRECT EXAMINATION

13 BY MR. RYAN:

14 Q. What was it you wanted to clarify?

15 A. Just in that response, my response was a little confusing.
16 I didn't mean -- suggested in my response that Mr. Snyder asked
17 me, my response suggested that I was ruling out the most likely
18 explanations, and I just wanted to make it clear, of course, I
19 wasn't ruling out the most likely explanation. I think my
20 response was a little garbled.

21 MR. RYAN: Thank you, your Honor.

22 THE COURT: You may step down, Dr. Gilbert.

23 THE WITNESS: Okay.

24 (Continued on next page)

D6d9usa2

Cue - direct

1 MR. BUTERMAN: Your Honor, plaintiffs called Eddy Cue.

2 THE COURT: Mr. Cue, if you could come up here please
3 and take the witness stand and remain standing.

4 EDDY CUE,

5 called as a witness by the Plaintiffs,

6 having been duly sworn, testified as follows:

7 THE COURT: How do you spell your first name, Mr. Cue.

8 THE WITNESS: E-D-D-Y.

9 THE COURT: Thank you. You're about to be handed a
10 document which constitutes your direct testimony as submitted
11 by Apple in this case. It's been given the designation DX --
12 does Apple have a number for it?

13 MR. SNYDER: 714 which was, isn't that the number of
14 home runs that Babe Ruth had?

15 THE COURT: DX714 it is.

16 Mr. Cue, do you have your declaration in front of you?

17 THE WITNESS: I do.

18 THE COURT: On the 37th page, is that your signature?

19 THE WITNESS: It is.

20 THE COURT: And did you sign this document on
21 April 26?

22 THE WITNESS: I did.

23 THE COURT: Before signing it, did you read it
24 carefully?

25 THE WITNESS: I did.

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Cue - direct

1 THE COURT: Do you swear to the truth of its contents?

2 THE WITNESS: I do.

3 THE COURT: Does the government have any objections to
4 receipt of DX714?

5 MR. BUTERMAN: Yes, your Honor. We have a couple.

6 Your Honor, we object to paragraph 20, the sentence,
7 "The popularity of apps has let our major retailers like Amazon
8 and Google to open up their own app stores," both on 401 and
9 602 grounds.

10 THE COURT: Is stricken.

11 MR. BUTERMAN: We object to paragraph 44. "Publishers
12 told us that they thought an Apple eBook store would be good
13 for three reasons," all of that on 802 grounds.

14 THE COURT: I'm going to receive this not for the
15 truth but for the fact that it was said. It's not stricken.

16 MR. SNYDER: Do I have any opportunity to respond to
17 the government's objections?

18 THE COURT: Yes.

19 MR. SNYDER: I didn't have an opportunity to respond
20 to 20. It happened so quickly.

21 THE COURT: Yes, it did. With respect to 44, let's
22 deal with 44 so that's where we are and then we'll circle back.

23 I'm granting the objection in terms of the hearsay
24 objection. But Mr. Snyder, did you want this received for the
25 truth?

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Cue - direct

1 MR. SNYDER: No, your Honor. Effect on the listener,
2 then existing mental state.

3 THE COURT: Great. That's how I'm receiving it.
4 Next. And then we'll circle back, Mr. Snyder.

5 MR. BUTERMAN: The last one your Honor is paragraph
6 108. "This model has encouraged many new and independent
7 publishers to partner with Apple and has also increased the
8 number of author self-publishing. The major reason for this is
9 our click-through contract where a publisher can simply go
10 online and accept the terms by clicking a button." We have a
11 401 and a 602 on that, your Honor.

12 THE COURT: I'm going to -- I think this is
13 objectionable the way it is phrased but not objectionable if
14 phrased differently. So, I'm going to assume that what this is
15 conveying is this witness's understanding and motive and not a
16 suggestion that he has looked inside the minds of many other
17 folks and discerned their motivation.

18 MR. BUTERMAN: Finally, your Honor, we'd also note
19 that there are several paragraphs in the testimony that it is
20 simply unclear at this point whether they are based on
21 Mr. Cue's direct knowledge or not. We're not challenging them
22 at this moment. However, we would like to reserve the right if
23 it turns out during the testimony that the statements
24 reflecting, for example, what was said in the Wall Street
25 Journal articles or other publications is not actually personal

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Cue - direct

1 knowledge of Mr. Cue to strike that after his testimony is
2 completed.

3 THE COURT: Yes. You may reserve that right.

4 MR. BUTERMAN: Thank you, your Honor.

5 THE COURT: So let's circle back to the first issue.
6 And that's paragraph 20. And Mr. Snyder wanted an opportunity
7 to argue that I should have kept that sentence in and not
8 granted the objection.

9 Mr. Snyder.

10 MR. SNYDER: Yes, your Honor.

11 I'm not suggesting that this is the earth shattering
12 testimony in his declaration, but we do believe that it is
13 helpful and relevant industry background and context. And
14 specifically certainly Mr. Cue has personal knowledge as -- in
15 his position at Apple and in the industry of this testimony.
16 But the relevance, your Honor, is that it's -- the evidence
17 indicates that one of the reasons the publishers were
18 interested in partnering with Apple was because of Apple's
19 innovation in new content markets. And so we believe it is
20 relevant that Apple, when it invented essentially the app
21 market in 2008 on its iPhone, that led to other major players
22 following their lead. So, too, when Apple was contemplating
23 opening its own bookstore, there was an industry belief, based
24 on Apple's successes in the app store and the iTunes store, for
25 that matter, that Apple would innovate as well in this market.

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Cue - direct

1 And we believe that Apple's leadership position as an innovator
2 in new content markets is critically important not only to
3 understanding the background but also in addressing the
4 government's claim that Apple's actions here were the product
5 of some unlawful intent as opposed to part and parcel of its
6 historic practice of entering and innovating new content
7 markets.

8 THE COURT: Thank you. I am going to strike the
9 sentence since this witness purports to represent the
10 motivations of other major retailers including Amazon and
11 Google and he's not competent to do that.

12 With those rulings, DX714 is received.

13 (Defendant's Exhibit 714 received in evidence)

14 THE COURT: Cross-examination.

15 DIRECT EXAMINATION

16 BY MR. BUTERMAN:

17 Q. Good morning, Mr. Cue. I don't know if you remember. We
18 met once before. My name is Lawrence Buterman. I'm an
19 attorney with the United States.

20 A. I do. It's good to be here today.

21 Q. Mr. Cue, the declaration that you provided here today, did
22 you actually sign that document on April 26 or did you provide
23 your signature in advance?

24 A. No. I signed it on April 26.

25 Q. And when was the last time you reviewed the entire

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Cue - direct

1 declaration prior to signing it?

2 A. I don't recall.

3 Q. Was it roughly around that time?

4 A. It would have been either that morning, that -- the night
5 before, right before I signed it.

6 Q. And Mr. Cue, if you look in your declaration -- I can
7 direct you to one example, paragraph 78, you have some
8 references to DXs in your testimony.

9 Do you see that?

10 A. I do.

11 Q. And do you know what the DXs refer to?

12 A. I believe they're document numbers that I was referring to
13 so that I could look at them.

14 Q. And did you review all the documents before you signed your
15 affidavit?

16 A. I did.

17 Q. And did they all have DX numbers on them?

18 A. Well, I don't remember that.

19 Q. Is it possible that the DX numbers were added to your
20 declaration after you signed it?

21 A. No.

22 Q. Mr. Cue, does Apple sell eBooks in all 50 states?

23 A. Yes.

24 Q. And all U.S. territories as well?

25 A. I'm not sure because I don't know what everything is a U.S.

D6d9usa2

Cue - direct

1 territory.

2 Q. Now, I'd like to begin today by picking up on something
3 from your declaration. So can you please turn to paragraph 98
4 of your declaration, sir.

5 A. Yes.

6 Q. Sir, do you see that in paragraph 98 you write, "After this
7 lawsuit was filed I learned for the first time about
8 allegations of publisher meetings, phonecalls and dinners. We
9 had no information about any of those communications during our
10 iBookstore negotiations, and I do not know today whether any of
11 them occurred or not."

12 Did I read that correctly?

13 A. Yes, you did.

14 Q. And that is your sworn testimony, sir?

15 A. It is.

16 Q. When you say "we," who are you referring to in that
17 sentence?

18 A. Apple.

19 Q. And you're saying that nobody at Apple had any knowledge of
20 any kind that publisher communications or publisher meetings,
21 phonecalls, and dinners were going on?

22 A. That's correct.

23 Q. How did you have the knowledge that nobody at Apple knew
24 that?

25 A. I work very closely with my team and if that was going on

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Cue - direct

1 they would have told me because it would have jeopardized my
2 negotiations.

3 MR. BUTERMAN: Can you please put up PX857.

4 Q. Sir -- let me give you some books.

5 Could you turn in your binder to the tab that's
6 labeled PX857, sir.

7 A. I know you're not going to believe this but I have 56 and
8 58.

9 Q. 857. I'm sorry. And I would believe that.

10 A. Yes.

11 Q. Now, sir, PX857 was a slide that was used in the United
12 States's opening and I just want to explain to you that every
13 single line that you see in PX857 represents a telephone call
14 between one of the five CEOs of the publishers who signed
15 agency agreements with Apple in late January of 2010.

16 Do you understand?

17 A. Yes.

18 Q. And I'll represent to you that there's well over a hundred
19 calls that are reflected in this exhibit. Okay?

20 A. Okay.

21 Q. Now, sir, can you turn to PX858.

22 Just so you understand this is another slide that was
23 used in the opening. And PX858 is a graphical representation
24 of when those phonecalls occurred.

25 And do you see that the phonecalls tend to be

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Cue - direct

1 clustered around key events that took place during the
2 negotiations between Apple and the publishers?

3 A. I see the clusters and how you've identified them.

4 Q. And so, for example, you see that there's a cluster of
5 calls that correspond to when Apple first reached out to the
6 publishers to set up meetings in early December. And I won't
7 go through them all, but you see that there's another cluster
8 that occurs right after January 4 and 5 when you send out
9 initial term sheets to all of the publishers. And then you see
10 January 21 and 22 which were your initial drop dead dates for
11 doing deals and there's a big bump in calls.

12 Do you see all those, sir?

13 A. Again, I see all the clusters, yes.

14 Q. Now, sir, at this time you were in fairly consistent
15 communication with the CEOs, were you not?

16 A. Sorry. At which time?

17 Q. I'm talking about the six week -- the six-week period
18 between the beginning of December and the end of January 2009
19 to 2010. You were in fairly regular communication with the
20 CEOs of these companies, were you not?

21 A. No, I was not.

22 Q. You weren't calling them?

23 A. Not throughout that period, no.

24 Q. You weren't sending them e-mails?

25 A. Again, yes.

D6d9usa2

Cue - direct

1 Q. You were meeting with them face-to-face as well?

2 A. Yes. I met with them face-to-face.

3 Q. You had a fair number of calls with the CEOs of these
4 publishers during that six-week period, did you not?

5 A. No, I did not.

6 Q. Mr. Cue, I'm handing you a document which we're going to
7 mark as PX867.

8 A. Thank you.

9 MR. SNYDER: Your Honor, I'm going to object to this
10 document. This is the first time we've seen it. Foundation.

11 THE COURT: Overruled.

12 Q. So, Mr. Cue.

13 A. Yes.

14 Q. Just to let you know, we have some documents and they are
15 actually in your binder. PX788 contains all phonecalls between
16 the publisher defendants and yourself -- amongst yourself, the
17 publisher, and the publisher defendants over the six-week time
18 period. And the chart that you're looking at in PX867
19 represents the phonecalls that you had with the publishers over
20 that time period.

21 Looking at that chart, is it fair to say that you had
22 a fair number of phonecalls with the CEOs of those five
23 publishers during the six weeks between when Apple first
24 approached the publishers to discuss the possibility of
25 entering into an agreement to sell eBooks and late January when

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Cue - direct

1 you signed the five publishers?

2 A. No. I had lots of communications with them at very small
3 intervals of time, in particular at the end. But I did not
4 have constant communication with them throughout that period of
5 time.

6 Q. This reflects that you were speaking to these individuals
7 at various points in time over that six-week period, correct?

8 A. I don't know what these calls represent, what timeframes
9 they are.

10 Q. We can agree, sir, that you did speak to Ryan Murray, John
11 Sargent, David Young, David Shanks, and Carolyn Reidy multiple
12 times over that six-week period, correct?

13 A. Yes.

14 Q. You were negotiating a deal with them?

15 A. Yes.

16 Q. And when you negotiate deals you have to talk to the people
17 you're negotiating with, correct?

18 A. Yes.

19 Q. So, can you put the other spiderweb back on?

20 MR. SNYDER: Objection.

21 THE COURT: And.

22 MR. SNYDER: Form.

23 THE COURT: Overruled.

24 Mr. Cue, I'm going to ask you to move that mic. It
25 moves. Put it under your chin. And keep your voice up.

D6d9usa2

Cue - direct

1 THE WITNESS: Thank you.

2 MR. SNYDER: Can I just make a standing objection to
3 the reference to spiderwebs. I don't want to stand up all the
4 time.

5 MR. BUTERMAN: I apologize.

6 THE COURT: I think we should refer to it by its PX
7 number.

8 Q. So, looking back at this document, sir, which is PX857, is
9 it your testimony here that you had no idea whatsoever that the
10 publishers were talking with one another at any point in time
11 while you were negotiating your Apple agency agreements with
12 them?

13 A. Yes. That's correct.

14 Q. Not one of those calls you were aware of, sir?

15 A. That's correct.

16 Q. And is it your testimony, sir, that nothing that any
17 publisher said at any point in time gave you any reason to
18 believe that those conversations were going on?

19 A. Sorry. Repeat -- I just want to make sure -- can you
20 repeat the question.

21 Q. Sure.

22 Is it your testimony that nothing that any of those
23 publisher defendant CEOs said at any point in time ever gave
24 you a reason to believe that those conversations were going on?

25 A. Yes. That's correct.

D6d9usa2

Cue - direct

1 Q. Not one of them?

2 A. Not one.

3 Q. And in your paragraph 98 you say that after this lawsuit
4 was filed you learned for the first time about the allegations
5 of publisher meetings, phonecalls, and dinners.

6 Well now that you've learned about those allegations
7 and you see the sheer number of phonecalls that took place,
8 sir, do you have an opinion as to whether the publishers were
9 working together in December of 2009 and January of 2010?

10 A. Yes, I do.

11 Q. And what's your opinion, sir?

12 A. I don't believe they were working together to do the deal
13 that I was working on because I did those deals and I struggled
14 and fought with them for many, many days to get them to sign.
15 And they argued different points. So if they were talking to
16 each other, I would have assumed that I would have had a much
17 easier time getting those deals done.

18 Q. Does it upset you to learn that your business partners were
19 talking to one another with this kind of frequency while you
20 were negotiating a deal with them?

21 A. If they were talking about my deal, I would.

22 Q. Turn to paragraph 108 of your declaration.

23 Do you have that, sir?

24 A. Just one second, please.

25 Yes.

D6d9usa2

Cue - direct

1 Q. And I want to direct you to the last sentence of paragraph
2 108.

3 Just so we're clear, this paragraph is talking about
4 adding self-published authors to the iBookstore; is that
5 correct?

6 A. Sorry. Repeat the question. I was reading it.

7 Q. This paragraph refers to Apple adding self-published
8 authors to the iBookstore, correct, and the effects of that?

9 A. It refers to both self-publishers and other publishers; not
10 just self-publishers.

11 Q. Self-publishers and independent publishers; is that
12 correct?

13 A. Yes.

14 Q. And you believe that the self-publishers had provided Apple
15 with an extremely important source of new eBooks and price
16 innovation; is that correct?

17 A. That's correct.

18 Q. You believe that Apple's activities with respect to
19 self-published authors have been innovative?

20 A. I do.

21 Q. Sir, isn't it true that Apple's actions with respect to
22 even just allowing self-published authors to be on the
23 iBookstore was simply a mirroring of what Amazon was doing?

24 A. No, it's not.

25 Q. Sir, can you turn to PX870 in your binder.

D6d9usa2

Cue - direct

1 Do you have the document, sir?

2 A. Yes.

3 Q. This is an e-mail from yourself -- or an e-mail chain
4 culminating at the top with an e-mail from Mr. Jobs to
5 yourself, correct? And it's dated March 29, 2010?

6 Is that correct?

7 A. You said to myself. It looks like this is an e-mail from
8 Steve to a gentleman by the name of Mr. Humphreys.

9 Q. Do you have 870, sir?

10 A. Sorry. Yes.

11 Q. And that's on the top there's an e-mail from yourself to --
12 excuse me. From Mr. Jobs to yourself dated March 29, 2010?

13 A. I see it.

14 Q. And that's before the iBookstore went live, correct?

15 A. That's correct.

16 MR. BUTERMAN: Your Honor, we'd like to offer PX870
17 into evidence.

18 MR. SNYDER: No objection, your Honor.

19 THE COURT: Received.

20 (Plaintiffs' Exhibit 870 received in evidence)

21 Q. Do you see that on March 29, 2010 Mr. Jobs asks a question
22 to you and he says, "Are we going to let anyone self-publish?"
23 And then his next question is, "Does Amazon?"

24 Do you see that, sir?

25 A. I do.

D6d9usa2

Cue - direct

1 Q. And your response is, "Yes and yes. We believe half of
2 Amazon's book count is from self-publishing (200K). My biggest
3 concern with self-publishing is we will need to review each
4 submission."

5 Do you see that sir?

6 A. I do.

7 Q. And then Mr. Jobs responds to you and says "Yep. What does
8 Amazon do?"

9 Do you see that, sir?

10 A. I do.

11 Q. So is it still your testimony that in allowing
12 self-published authors on the iBookstore Apple wasn't merely
13 following what Amazon was doing?

14 A. That's correct.

15 Q. Mr. Jobs was the ultimate decision maker as to whether to
16 allow self-published authors on the iBookstore, correct?

17 A. He's the ultimate decision maker of Apple.

18 Q. And would it be fair to say that Mr. Jobs' key questions
19 here relate to what is Amazon doing?

20 A. One question is.

21 Q. And he's -- Mr. Jobs is, in fact, basing his decision, is
22 he not, on what you are informing him about what Amazon does,
23 correct?

24 A. That's not correct.

25 Q. Now, Mr. Cue, would you agree that with respect to most of

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Cue - direct

1 the content businesses that Apple has entered, though it wasn't
2 necessarily the first entrant, it ended up being a price
3 leader?

4 A. I don't know about price leader. We were certainly
5 competitive. I always viewed every store that we entered we
6 were competitive.

7 Q. Mr. Cue, do you recall being deposed in this matter on
8 March 12, 2013?

9 A. I do.

10 Q. And do you recall being asked the following question and
11 giving the following answer. And I'm reading from lines 3815
12 from your deposition.

13 "Q. Has Apple ever considered, with any media business that it
14 was a new entrant into, engaging in loss leading in order to
15 gain market share?

16 "A. No. Every entrant that we were, we were first, first at
17 being successful. We weren't first at being in the markets.
18 And we were the price leader. We were cheaper than everybody
19 across the product. So we were the first to introduce 99 cents
20 across the board. We were the first to introduce \$1.99 for TV
21 shows. We were the first to introduce \$9.99 and \$14.99 for
22 movies. We were the first to introduce app stores at 99 cents.
23 So we were always the leader in price, at bringing the price
24 down in the stores that we entered."

25 Do you recall being asked that question and giving

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Cue - direct

1 that answer?

2 A. I do.

3 Q. And do you believe that's true?

4 A. I do.

5 Q. So, you would agree that with respect to most of the
6 content businesses that Apple has entered, though it wasn't the
7 first entrant, it ended up being a price leader, correct?

8 A. As I said, in the document and -- yes.

9 Q. Now, so it's clear, that Apple, in those businesses -- and
10 I think that that refers to music, TV, movies, and apps,
11 correct?

12 A. I believe those are all. There may be some others, but.

13 Q. Apple was a leader in bringing down the prices in -- that
14 existed in the marketplace at that point in time, correct?

15 A. Not across all of those.

16 Q. But with respect to digital books, sir, Apple didn't bring
17 down prices, did it?

18 A. We did for certain books.

19 Q. Sir, isn't it a fact that Apple's entry rather than
20 bringing down prices actually caused prices to go up?

21 A. For certain books.

22 Q. And the reason that Apple's entry caused prices to go up
23 instead of down is because as opposed to the other markets that
24 you helped Apple enter into, there was already an established
25 player in this market that had brought prices down, correct?

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Cue - direct

1 A. That's not correct.

2 Q. Now, you mentioned a few moments ago that prices went up
3 for some books. Is that accurate?

4 A. That's correct.

5 Q. You do understand that the average prices of the eBooks, of
6 the five major publishers that Apple signed deals with in late
7 January in -- excuse me in late January of 2010 went up and
8 stayed elevated at least through 2012, correct?

9 A. Again, depends on which books you're looking for. So if
10 you could be more specific for me.

11 Q. I'm talking about the average prices of all the eBooks. Of
12 the publishers that you did deals with.

13 A. Yes.

14 Q. You said some books went up and some books went down?

15 A. And some became available for the first time.

16 Q. And what I want to know, sir, is whether you were aware
17 that the average price of the eBooks of the five major
18 publishers that you signed deals with went up and stayed
19 elevated through at least 2012?

20 A. It's not something I recall looking at.

21 MR. BUTERMAN: Put DX842 on the screen.

22 Q. You can look at DX842 in your book, Mr. Cue.

23 Now, Mr. Cue, you understand that Apple entered into
24 agency agreements with Hachette, HarperCollins, Macmillan,
25 Penguin, and Simon & Schuster in late January of 2010, correct,

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Cue - direct

1 sir?

2 A. That's correct.

3 Q. And do you see -- let's leave out Penguin for a moment
4 because we'll get to that later -- but for the other four, do
5 you see that on April 1, 2010 -- which you would agree roughly
6 corresponds to the date that the iBookstore went live?

7 A. That's correct.

8 Q. This shows that the average price of those publishers'
9 books, all of their books, the average price overall, went up
10 drastically.

11 Do you see that?

12 A. I do.

13 Q. Is that consistent with what you understood Apple's entry
14 caused in the marketplace?

15 A. Again, I disagreed before and I'll disagree again.

16 Q. You disagree with the numbers on this chart?

17 A. I don't know -- I don't disagree with the numbers. I'm
18 sure you calculated them right. These numbers don't include
19 other books that you've left out here.

20 Q. Actually, sir, this is a chart that you prepared, your team
21 prepared. This is Apple's chart, not the government's.

22 A. Okay. It doesn't include the books that were not in the
23 marketplace that we brought to the marketplace for the first
24 time.

25 Q. Mr. Cue, on April 1, 2010 you recognized that the prices

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Cue - direct

1 for New York Times bestsellers and new releases went up,
2 correct?

3 A. That's correct.

4 Q. And that wasn't a surprise to you, was it?

5 A. It was not.

6 Q. And the reason it wasn't a surprise to you was because all
7 of the publishers had told you during the course of your
8 negotiations that they had a problem with Amazon's pricing of
9 New York Times bestsellers and new releases, correct?

10 A. That's correct.

11 Q. And in fact, each of the publishers asked you for price
12 tiers which were higher than the ones you initially proposed in
13 order to give them more flexibility to price books above the
14 level that you had proposed, correct?

15 A. That's correct.

16 Q. And you did give them price tiers that allowed them to
17 price -- to raise their prices above the 9.99 price point that
18 prevailed in the market for New York Times bestsellers and new
19 releases at that time; is that correct, sir?

20 A. That's correct.

21 Q. Now, sir, when the iBookstore went live, you noticed that
22 the publishers were pricing those New York Times bestsellers
23 and new releases typically at 12.99 and 14.99, correct?

24 A. I did.

25 Q. And those were the top of the caps of the pricing tiers

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Cue - direct

1 that you had provided to them in your negotiation, correct,
2 sir?

3 A. That's correct.

4 Q. And it didn't surprise you either that the publishers were
5 pricing at the caps, did it?

6 A. No, it did not.

7 Q. And the reason it didn't surprise you that the publishers
8 were pricing at the caps was for the very same reason, because
9 you know they wanted higher prices, correct?

10 A. That's correct.

11 Q. In fact, this wasn't something that only you were aware of?
12 This was something that Mr. Jobs was aware of as well, correct?

13 A. Yes. They had expressed they wanted higher prices from us.

14 Q. And that was consistent throughout the negotiations,
15 correct?

16 A. Yes, it was.

17 Q. So, let's pull up PX869. It's in your book, sir.

18 I asked you a moment ago, sir, whether Mr. Jobs was
19 also aware that the publishers wanted to raise prices and you
20 answered yes.

21 And PX869 is an e-mail chain between Mr. Jobs and the
22 Sethh Humphrey who I believe is a college student.

23 Do you see that?

24 A. I do.

25 Q. And do you see that --

D6d9usa2

Cue - direct

1 MR. BUTERMAN: Your Honor, we'd like to offer PX869.

2 MR. SNYDER: No objection.

3 THE COURT: Received.

4 (Plaintiffs' Exhibit 869 received in evidence)

5 Q. So do you see in the bottom e-mail, Mr. Cue, that
6 Mr. Humphrey writes on February 9, 2010, which is after you've
7 made the announcement that you're launching the iBookstore but
8 before it actually went live, correct, sir?

9 A. That's correct.

10 Q. And he writes, "Hello, Mr. Jobs. I don't really expect a
11 reply from this, but here goes. I am a Mac and Kindle owner.
12 And with Apple strongarming Amazon into raising eBook prices,
13 this is detrimental to my reading as a college student. You
14 have so much. Wouldn't it be okay for us little guys to have
15 something? If you read this, thanks for your time. Peace."

16 Did I read that correctly sir?

17 A. Yes, you did.

18 Q. And Mr. Jobs actually replied to the e-mail, did he not?

19 A. It appears he did, yes.

20 Q. And Mr. Jobs wrote, "It's the publishers that are raising
21 prices not Apple." Correct?

22 A. That's correct.

23 Q. And at this point in time how did Mr. Jobs know -- strike
24 that.

25 At this point in time Mr. Jobs knew that the

D6d9usa2

Cue - direct

1 publishers were going to be raising prices, correct?

2 A. That's correct.

3 Q. And Sethh Humphrey responds, "Yes, but the change in prices
4 only comes after your company has let major publishers set
5 their own prices. These publishers must realize that they have
6 almost one hundred percent profit coming in from these eBooks
7 because no paper is used. There are other fees and such but
8 still, greed does not beget most, even those at the top."

9 Did I read that correctly?

10 A. Yes, you did.

11 Q. And then Mr. Jobs responds again, sir, does he not?

12 A. Yes, he does.

13 Q. And his question is, "How do we stop the publishers from
14 setting their own prices and terms?"

15 Correct?

16 A. That's correct.

17 Q. Now, sir, prior to Apple's entry into the market, the
18 publishers were not setting their own prices and terms,
19 correct?

20 A. That's correct.

21 Q. Apple gave the publishers the ability to set their own
22 prices and terms, correct?

23 A. We negotiated that.

24 Q. Now, sir, look back at your declaration.

25 Do you see on page 3 that you discuss Apple's core

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Cue - direct

1 business principles and strategies for its digital content
2 stores?

3 A. I do.

4 Q. And I believe as your declaration goes on, you laid out in
5 bold various core principles. Is that fair?

6 A. That's fair.

7 Q. Broad selection of available content, simple competitive
8 pricing, opportunity to make a profit, same material terms, and
9 a level playing field for all content providers.

10 Were those the ones that you've identified?

11 A. Yes, they are.

12 Q. And you believe that those are core principles?

13 A. I do.

14 Q. Now, sir, when you went to meet with the publishers in
15 December you knew that the publishers -- excuse me. You knew
16 that many New York Times bestsellers and new releases were
17 actually being sold at a loss, correct?

18 A. I did.

19 Q. No doubt about it?

20 A. I didn't have the contracts in front of me but that's what
21 I was led to believe.

22 Q. And you also knew that windowing was going on or threats of
23 windowing had been made, correct?

24 A. Both. That's correct.

25 Q. No doubt about that either?

D6d9usa2

Cue - direct

1 A. That's correct.

2 Q. And so, sir, you go out to meet the publishers. And they
3 tell you that the marketplace is one which violates two of your
4 core principles, correct? Digital products aren't available at
5 the same time as physical products? You can't make a profit
6 that you want?

7 A. That's correct.

8 Q. Is that fair?

9 A. That's correct.

10 Q. So essentially two deal breakers for Apple, would you
11 agree?

12 A. That's correct.

13 Q. But, sir, your response when you learned of this
14 information wasn't to say, you know what, this is a marketplace
15 that doesn't jive with our core principles, correct?

16 A. I don't understand your question. I'm sorry.

17 Q. Let me make it -- I'm sorry. Let me try to make it a
18 little bit clearer.

19 Isn't it true that your response, after learning this
20 information which violates your core principles according to
21 this document, your response was, "Nothing scared me or made me
22 feel like we can't get these deals done right away."

23 That's what you told Mr. Jobs after meeting with the
24 publishers and learning of this information, correct, sir?

25 A. That's correct.

D6d9usa2

Cue - direct

1 Q. And that was done when you and Mr. Jobs had an
2 understanding that you would be entering the eBook market if
3 you were going to enter under a wholesale model, correct?

4 A. That's correct.

5 Q. Now, if we look at PX36. Do you recall PX36, sir?

6 A. Sorry. Let me get to it.

7 Q. Sure, please.

8 A. I do.

9 Q. PX36 contained a series of notes both from Mr. Saul and
10 Mr. Moerer which are forwarded to you, correct?

11 A. That's correct.

12 Q. And these notes were made during the second day of meetings
13 that you had with three of the six publishers that you met with
14 on December 15 and December 16, correct, sir?

15 A. I'm not sure when the notes were made but that's when the
16 e-mail was sent.

17 Q. Well, you recall, sir, that on December 15 you, Mr. Moerer,
18 and Mr. Saul met with Hachette, Random House, and Penguin?

19 A. I do.

20 Q. And then on December 16 you, Mr. Saul, and Mr. Moerer met
21 with Macmillan, Simon & Schuster, and HarperCollins, correct?

22 A. I do.

23 Q. Now, if you turn to the third page of the document. And
24 you understand over here we're looking at the notes of
25 Mr. Saul, correct?

D6d9usa2

Cue - direct

1 A. That's correct.

2 Q. And the purpose of this document, as you say if we look at
3 the last page, is to provide Mr. Jobs with an update of what
4 took place during this meeting, correct?

5 A. That's correct.

6 Q. With respect to HarperCollins, if you look in the middle of
7 the third page, do you see the first line after the word
8 HarperCollins it says "Interested in agency model to fix Amazon
9 pricing. (We said no)."

10 Did I read that correctly?

11 A. You did.

12 Q. So, sir, you were aware, were you not, by December 16 that
13 at least one publisher was planning on using an agency model in
14 order to fix industry pricing, correct?

15 A. Yes. Again, to fix -- they wanted an agency model with us.
16 Let me be clear. I wasn't trying to negotiate for the
17 industry. But they wanted an agency model with us so that they
18 would be able to set the price to fix the 9.99 price, which is
19 what this says.

20 Q. So, in other words -- and thank you for the clarification.

21 You were negotiating a deal just for Apple?

22 A. That's correct.

23 Q. With HarperCollins -- well eventually with all these
24 publishers, you were just negotiating deals with them for
25 content for Apple, correct?

D6d9usa2

Cue - direct

1 A. That's correct.

2 Q. But you were aware, as of December 16, that the publishers
3 had much larger goals in mind, correct?

4 A. Again, that's -- I knew that they were having issues with
5 other publishers and Amazon in particular. But how they were
6 going to resolve them and what they were going to do, other
7 than windowing, which I was aware of, this was another proposal
8 that they made to us saying hey we might want to go to an
9 agency model. At this point all I'm doing is listening. I'm
10 in there for the first time meeting those folks and I'm just
11 taking -- taking it in, letting me know what they want to do.

12 Q. So, sir, during this meeting you were informed by
13 HarperCollins that they want to do an agency model, not for any
14 reason with respect to Apple, but because they're interested in
15 fixing Amazon's pricing, correct? That's what they told you?

16 A. That's not correct.

17 Q. Isn't that what they told you?

18 A. No.

19 Q. Isn't that what this document says, sir?

20 A. No, it does not.

21 Q. "Interested in agency model to fix Amazon pricing." That's
22 not what this says?

23 A. I'd be happy to clarify if --

24 Q. Can you answer my question, sir? Does this document say
25 that HarperCollins was "interested in an agency model to fix

D6d9usa2

Cue - direct

1 Amazon pricing. We said no."

2 A. That's correct. That's what it says.

3 Q. Now, you talk about, in your declaration, the fact that at
4 some point thereafter you and Mr. Jobs decided to pursue an
5 agency model, correct?

6 A. That's correct.

7 Q. In fact, the timeframe was pretty tight, was it not?

8 A. That's correct.

9 Q. You finished up your meeting with the publishers on
10 December 16, correct?

11 A. That's correct.

12 Q. You left Carolyn Reidy and you went straight to the
13 airport; is that correct?

14 A. I believe so but honestly I don't recall the exact.

15 Q. Is it fair to say, sir, that you came back to the office --
16 you came back to Cupertino on December 17?

17 A. Yes.

18 Q. And isn't it true, sir, that on December 18 you reached out
19 to Carolyn Reidy, John Sargent, and Markus Dohle, the CEOs of
20 Simon & Schuster, Macmillan, and Random House, and told them
21 that you were already back in New York, correct?

22 A. Sorry, that I was back in New York?

23 Q. Yes.

24 A. You said I called them to tell them I was back in New York?

25 Q. You e-mailed to tell them that you were back in New York?

D6d9usa2

Cue - direct

1 A. Sorry. I don't remember the dates from that standpoint.
2 So if you'd like to clear it up with me that would be great.

3 Q. Let's see if we can get the dates worked out here.

4 You agree that December 16 in the afternoon you have
5 your last meeting with one of the publishers, correct?

6 A. That's correct.

7 Q. And then you fly back to Cupertino?

8 A. That's correct.

9 Q. And you go into the office on the 17th?

10 A. That's correct.

11 Q. And you have a meeting with Mr. Jobs where you discuss what
12 took place?

13 A. I had discussed what took place with Mr. Jobs all along the
14 path, so yes.

15 Q. And by December 18, sir, the next day, you're actually no
16 longer in Cupertino, you're back in New York, correct?

17 A. I don't recall that.

18 Q. Can you turn to PX56 in your binder.

19 A. Yes.

20 Q. Do you see, sir, that PX56 is an e-mail from yourself to
21 Markus Dohle dated December 18, 2009?

22 A. I do.

23 Q. And do you see that you tell Mr. Dohle in this e-mail that
24 you're back in New York for a vacation?

25 A. I do.

D6d9usa2

Cue - direct

1 Q. And even though you're back in New York for a vacation, you
2 still request some time with him on Monday or Tuesday to get
3 together, correct?

4 A. I do.

5 Q. And the purpose of getting together is to update him on all
6 your findings and thoughts, correct?

7 A. I'm sure it's to get another update from him based on what
8 I've thought, so, yes, I wanted an update.

9 Q. You write, "I want to update you"?

10 A. Right.

11 Q. "All my findings and thoughts," right?

12 A. Correct.

13 Q. And you say, "I have some things I want to run by you. I
14 only need 30 minutes. If not, can I call you?"

15 Do you see that?

16 A. I do.

17 Q. And if you look at tabs PX501 and 502, sir, you'll see,
18 will you not, that you sent similar e-mails to Mr. Sargent and
19 Ms. Reidy?

20 A. I do.

21 Q. So, sir, within 48 hours, roughly, of telling HarperCollins
22 no to their request or to their statement that they were
23 interested in an agency model in order to fix Amazon pricing,
24 you're back in New York and you want to talk to these three
25 publishers, correct?

D6d9usa2

Cue - direct

1 A. I'm on vacation in New York and I requested meetings with
2 them, yes.

3 Q. And the meetings, sir, were in order to pitch to them the
4 very agency model that HarperCollins told you it was interested
5 in in order to fix Amazon's pricing, correct?

6 A. That's not correct.

7 Q. Is it your testimony here that you did not pitch the agency
8 model to Ms. Reidy, Mr. Dohle, and Mr. Sargent during this
9 visit to New York?

10 A. That's -- that's not what I said, so.

11 Q. No, no. I'm asking you. Did you?

12 A. Yes, I did.

13 Q. Now, you did understand at this point that HarperCollins
14 had expressed that it was interested in an agency model in
15 order to fix Amazon's pricing, correct?

16 A. With us, that's correct.

17 Q. And, in fact, sir when you spoke to Ms. Reidy, Mr. Dohle,
18 and Mr. Sargent, your pitch as to why they should adopt the
19 agency model was, in fact, that it solved their Amazon issues,
20 correct?

21 A. Not correct.

22 Q. Isn't it true, sir, that on December 21, 2009 after you had
23 spoken to Ms. Reidy, Mr. Dohle, and Mr. Sargent, you e-mailed
24 Mr. Jobs and you told him about your meetings with those three
25 CEOs?

D6d9usa2

Cue - direct

1 A. That's correct.

2 Q. And isn't it true that in that recounting of what took
3 place you told Mr. Jobs that they, referring to the three CEOs,
4 saw both the plus and the negative of the deal that you were
5 proposing?

6 A. That's correct.

7 Q. And the plus -- and maybe we can put this up if you want to
8 look. It's PX43 in your binder.

9 Do you see, sir, the plus that you tell Mr. Jobs that
10 these CEOs saw from the deal that you proposed "solves Amazon
11 issue."

12 Did I read that correctly?

13 A. You did.

14 Q. And is it your testimony here under oath, sir, that you did
15 not pitch the deal to those three publishers in terms of "doing
16 an agency deal with us will allow you to solve your Amazon
17 problem"?

18 A. That's not the way I pitched it. That's correct.

19 Q. But that's the way they understood it, correct?

20 A. They -- this refers to the fact that I was allowing them,
21 because it was an agency model, to price books at higher than
22 9.99 which I knew they wanted to do. They referred to that as
23 their Amazon problem. So I -- in our agreement, they would be
24 allowed to price books higher than 9.99.

25 Q. But, sir, if they were only allowed to price books at Apple

D6d9usa2

Cue - direct

1 above 9.99, that wouldn't be solving their Amazon problem,
2 correct?

3 A. It would with us.

4 Q. It wouldn't be solving their Amazon problem though overall,
5 would it?

6 A. Again, it solves it for us. It doesn't solve it for
7 anybody else.

8 Q. Now you say that it solves the Amazon issue. You don't say
9 that they saw the plus as it solves the Amazon issue with
10 respect to us, did you?

11 A. That's what I wrote.

12 Q. And are you confident, sir, that the publishers understood
13 it the same way that you're presenting it?

14 A. Yes.

15 Q. Mr. Cue, you spoke with Markus Dohle, the CEO of Random
16 House, on December 21, 2009, correct?

17 A. That's correct.

18 Q. And during that conversation you told Mr. Dohle, did you
19 not, that you thought book prices were becoming too low?

20 A. That's not correct.

21 Q. And you told Mr. Dohle that because you thought book prices
22 were becoming too low that you were suggesting an agency model,
23 correct?

24 A. Those are not my words.

25 Q. Do they represent what you told Mr. Dohle?

D6d9usa2

Cue - direct

1 A. No.

2 Q. Could you turn to PX336 in your binder, sir.

3 Do you have that, sir?

4 A. I do.

5 Q. Do you see the e-mail from Mr. Dohle to other people at
6 Random House dated December 22?

7 A. I do.

8 Q. And do you see that in the second paragraph he writes, "As
9 you know, he is against windowing. He also thinks that book
10 prices are becoming too low - he is worried about the consumer
11 perception. Therefore, he suggests an agency model."

12 Is it your testimony, sir, that Mr. Dohle was writing
13 something incorrect?

14 A. No, it is not.

15 (Continued on next page)

D6DPUSA3

Cue - direct

1 BY MR. BUTERMAN:

2 Q. Now, that's not the only thing that you told Mr. Dohle
3 during your meeting -- during your phone conversation with him,
4 correct?

5 A. No, it's not.

6 Q. In fact, the other thing that you told Mr. Dohle was
7 that -- In fact, well, let me back up.

8 You also had a discussion with Mr. Dohle about whether
9 Amazon would be willing to move to an agency model as well,
10 correct?

11 A. Not correct. He shared that information with me.

12 Q. Do you see in the bottom, in the last paragraph, Mr. Dohle
13 writes, "I told him" -- and you understand the "him" here
14 referring to be you?

15 A. I do.

16 Q. "I told him that I have doubts that Amazon would lower the
17 prices again once we would establish a sustainable eBook
18 business model for the market. I also indicated that Amazon
19 would not accept a distributor model."

20 You understand the distributor model to be the agency
21 model, correct?

22 A. I do.

23 Q. And then he writes, "he answered," referring to you,
24 correct? He's referring to you?

25 A. Yes.

D6DPUSA3

Cue - direct

1 Q. "He answered that windowing could be used to establish a
2 distributor model on print pub date for eBooks (coming back to
3 simultaneous publication)."

4 And now, sir, is it your testimony that you did not
5 tell Mr. Dohle on December 21st, 2009, that Random House could
6 use a threat of windowing in order to move Amazon to an agency
7 model?

8 A. That's correct, I did not.

9 Q. He just made this up?

10 A. That's not what I said.

11 Q. I'm asking.

12 A. I responded -- Would you like me to respond to the
13 communication I had with him?

14 Q. I would like to know, sir, whether it's your testimony that
15 you did not say this?

16 A. These are not my words, no.

17 MR. BUTERMAN: Your Honor, would this be an
18 appropriate time for our break?

19 THE COURT: Yes. We'll have a ten-minute recess.

20 (Recess)

21 BY MR. BUTERMAN:

22 Q. Mr. Cue, before we broke, we were discussing PX336, which
23 is a writeup of a conversation that you had with Mr. Dohle.
24 The writeup being Mr. Dohle's, correct?

25 A. That's correct.

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Cue - direct

1 Q. And I was asking you about the fourth paragraph in the
2 document. Do you see the third paragraph, the one that says
3 "He said"? "He said he would provide us with some data
4 regarding his idea/model." Do you see that?

5 A. I do.

6 Q. And do you see that in the next sentence you say -- he --
7 I'm sorry. Mr. Dohle writes, "He also said that he would call
8 some publishing peers to discuss;" do you see that?

9 A. I do.

10 Q. Isn't it true that during your meeting with Mr. Dohle, you
11 also made clear to him that you planned to discuss the agency
12 model that you were proposing to Mr. Dohle with other
13 publishers?

14 A. Yes, it is.

15 Q. Now, I was asking you about this fourth paragraph, the one
16 that talks about windowing, how windowing -- that windowing
17 could be used to establish a distributor model on print pub
18 date for eBooks coming back to simultaneous publishing?

19 THE COURT: Fifth paragraph?

20 MR. BUTERMAN: I'm sorry, your Honor. The fifth
21 paragraph.

22 Q. Do you see that, sir?

23 A. I do.

24 Q. Now, sir, you recall that in late January, after you had
25 signed an agency agreement with Macmillan, you became aware

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Cue - direct

1 that Macmillan had gone out to Seattle and presented the exact
2 same threat to Amazon, correct?

3 A. I don't know about the exact same threat. I read articles
4 about Amazon and Penguin getting into a disagreement based on
5 an agency model.

6 THE COURT: Amazon and Penguin?

7 THE WITNESS: Sorry. Thank you.

8 THE COURT: Amazon and?

9 THE WITNESS: And Macmillan, sorry. Thank you for
10 correcting me, your Honor.

11 Q. So just so we're clear, and we'll get to this a little bit
12 later, you learned that Macmillan was going out to talk to
13 Amazon -- or you learned that Macmillan had gone out to talk to
14 Amazon when you read about it in the papers, correct?

15 A. Yeah, I don't know who went to whom or whatever. I know
16 that Amazon and Macmillan had talked and had some kind of
17 disagreement.

18 Q. Okay. Now, when you saw that Macmillan had told Amazon
19 that if it wanted its new release books, eBooks, without a long
20 period of windowing, it needed to be on an agency model, was
21 that at all surprising?

22 A. No, it did not.

23 Q. And the reason that that didn't surprise you, sir, is
24 because you knew all along that following Macmillan's signing a
25 deal with Apple, it was going to fly out to Seattle and make

D6DPUSA3

Cue - direct

1 that exact offer to Amazon, correct?

2 A. No, that is not correct.

3 Q. But, yet, you weren't surprised when you saw that they had
4 made that offer?

5 A. That's correct.

6 Q. And is it your testimony here, sir, just so we're clear,
7 that that's not based on information that Mr. Sargent provided
8 you?

9 A. That's correct, he did not provide me any information.

10 Q. Now, I want to go back to -- I'm sorry. We got a little
11 sidetracked. Let me take you back to December 21st. You also
12 spoke with Miss Reidy that day, correct?

13 A. That's correct.

14 Q. And do you recall telling Miss Reidy that you believed that
15 it was important for Apple that there be some level of
16 reasonable pricing in the eBooks market?

17 A. Yes, I do.

18 Q. And did you also tell her, sir, that you felt that the only
19 way to get this was for the industry to go to an agency model?

20 A. With us, that's correct.

21 Q. So you were telling Miss Reidy -- Just so we're clear, you
22 were telling Miss Reidy on December 21st that you needed the
23 entire industry --

24 A. All of the publishers.

25 Q. -- all of the publishers to go to an agency model with you,

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Cue - direct

1 with Apple, correct?

2 A. That's correct.

3 Q. That's your testimony under oath, sir?

4 A. Yes, it is.

5 Q. No doubt about it?

6 A. Yes.

7 Q. Do you also recall telling Miss Reidy that you believed
8 that new release eBooks should be priced at \$12.99?

9 A. I told her we were willing to accept a maximum price point
10 of 12.99, yes.

11 Q. So could you turn to PX540 in your binder, sir? Now,
12 Mr. Cue, do you see that PX540 is Miss Reidy's writeup of her
13 conversation with you on December 21st?

14 A. I do.

15 Q. And she starts off by saying, "Eddy Cue phoned me this
16 morning (rather than come in for a visit);" do you see that?

17 A. I do.

18 Q. And she goes on to say, "He wanted to relay his
19 conclusions, having met with all the major publishers and
20 looked at the online retailing market once he got home." Do
21 you see that?

22 A. I do.

23 Q. And I think that this is laid out in your declaration, but
24 so we're clear, you did make it clear to the publishers, to
25 each publisher, who the other publishers were that you were

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Cue - direct

1 negotiating with, correct?

2 A. That's not correct.

3 Q. You told Miss Reidy -- Did you, or did you not, tell
4 Miss Reidy that you had met with all the other major
5 publishers?

6 A. I did.

7 Q. And did you have any doubt that Miss Reidy would know who
8 that refers to?

9 A. No.

10 Q. Now, do you see that in the second paragraph, the one that
11 has the No. 2 before it, Miss Reidy writes, and she's relaying
12 four points that came out -- that she's writing came out of the
13 conversation, correct?

14 A. That's correct.

15 Q. And she says, "It's important to Apple that there be some
16 level of reasonable pricing. They feel the only way to get
17 this is for the industry to go to the agency model, like with
18 the App Store. So the publisher sets the price to the
19 consumer. They feel it's a better way to do it, unlike our
20 usual terms of sale."

21 Does that accurately reflect what you told Miss Reidy
22 on December 21st, 2009?

23 A. It does.

24 Q. And just so we're clear, your testimony is that when you
25 said that the industry needed to go to an agency model, what

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Cue - direct

1 you were referring to were all the publishers, correct?

2 A. At this particular point, that's correct.

3 Q. And do you see in the third bullet, with the paragraph with
4 the No. 3, it says in the middle, "Therefore, they feel that
5 new release eBooks should be priced at 12.99;" do you see that?

6 A. I do.

7 Q. And is it your testimony that you told this to Miss Reidy,
8 or not?

9 A. I did not.

10 Q. Now, you testified quite clearly that when you used the
11 word "industry," you were referring to all of the publishers?

12 A. In bullet point No. 2, that's correct.

13 Q. Do you see bullet point 4?

14 A. Yes, I do.

15 Q. And do you see that Miss Reidy writes, "We would have to
16 'get everyone else to go to the agency model.' When I said,
17 'but, of course, we can't talk to our competitors,' he said he
18 didn't mean other publishers, but our accounts. To which I
19 replied, 'if we make these our terms, then they are our
20 terms.'" Do you see that?

21 A. I do.

22 Q. And so it's clear that you told Miss Reidy not only that
23 all publishers needed to move to an agency model, but also that
24 all retailers of those publishers needed to move to an agency
25 model, correct?

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Cue - direct

1 A. That's correct.

2 Q. And that included Amazon?

3 A. That's correct.

4 Q. Isn't it true, sir, that throughout your negotiations with
5 the publishers, you constantly pitched the deal that you were
6 proposing as a way for them to change the entire eBooks market?

7 A. No, that is not true.

8 Q. Do you recall speaking with Maja Thomas of Hachette on or
9 about January 19th, 2010?

10 A. Roughly, yes.

11 Q. Do you recall telling Miss Thomas that Apple believes that
12 the deal that it was proposing is the best chance for the
13 publishers to challenge the 9.99 price point; otherwise, they
14 will continue to supply to consumer through third parties, in
15 effect, cementing consumer expectation of 9.99 as a top price?
16 Do you recall telling that to Miss Thomas?

17 A. I do.

18 Q. And, sir, when you tell Miss Thomas that doing a deal with
19 Apple is the best chance to challenge the 9.99 price point,
20 you're not talking about the 9.99 price point with respect to
21 Apple, correct? You're talking about the 9.99 price point in
22 the industry?

23 A. I'm talking about the existing 9.99 price in the industry
24 but as it relates to Apple.

25 Q. Right. In other words, do a deal with Apple is your best

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Cue - direct

1 chance to change the industry, correct?

2 A. No, that's not correct.

3 Q. Mr. Moerer was working at your direction in this matter,
4 correct?

5 A. That's correct.

6 Q. And do you know that Mr. Moerer had a conversation with
7 Miss McIntosh on January 9th, 2010?

8 A. I do.

9 Q. And are you aware that during that conversation, according
10 to Miss McIntosh, Mr. Moerer told her that you felt that the
11 agency model was the only way to get all publishers committed
12 to simultaneous digital print release? Is that fair?

13 A. Yes, I'm aware of that.

14 Q. Okay. And do you recall that you also told -- according to
15 Miss McIntosh, you also said that Apple had come up with a way
16 that would move the whole market off 9.99 and that Apple thinks
17 an agency model is the only way to do it?

18 A. Again, I don't recall that, in those words. Those aren't
19 my words.

20 Q. Is it consistent with what you were telling the publishers
21 during the course of your negotiations with them?

22 A. Not at that particular time, no.

23 Q. When you say not at that particular time, is it something
24 that you did tell them during the course of your negotiations
25 at some point in time?

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Cue - direct

1 A. Tell them which thing?

2 Q. That the agency model that you were proposing would move
3 the whole market off of 9.99?

4 A. Again, we believed, with Apple, they would have the
5 opportunity to move the market from 9.99 to the higher price
6 points that they wanted, yes.

7 Q. The whole market?

8 A. Apple.

9 Q. Sir, this says the whole market, though, doesn't it?

10 A. You asked me what my words are.

11 Q. Okay. So it's your testimony here that during the course
12 of your negotiations with the publishers, you never spoke in
13 terms of moving the whole market or moving the entire industry,
14 meaning the entire industry and not just Apple?

15 A. To what? Sorry.

16 Q. To higher prices?

17 A. No. We talked about moving them to an agency model.

18 Q. Which you knew would lead to higher prices for New York
19 Times best sellers and new releases, correct?

20 A. For some books, we I believed it would.

21 Q. I'm sorry, I --

22 A. I'm sorry. I said, for some books, I believed it would.

23 Q. For the New York Times best sellers and new releases, I
24 think you testified earlier that you believed it would?

25 A. For the ones they made available, that's correct.

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Cue - direct

1 Q. Could you turn to paragraph 61 of your declaration?

2 A. Oh, declaration.

3 Q. And, sir, there is in italics above paragraph 61 it reads,
4 "Competitive prices: My all-agency idea;" do you see that?

5 A. That's correct.

6 Q. And when I read paragraph 61, it seems -- and please
7 correct me if I'm wrong -- that what you're describing is the
8 idea that both you and Mr. Jobs agreed with; is that fair?

9 A. Yes, it is.

10 Q. And that was the idea that you placed in the initial term
11 sheet that you sent to the publishers on January 4th and 5th,
12 correct?

13 A. That's correct.

14 Q. And so, sir, if you turn to PX21 in your binder, that's an
15 example of the January term sheet, correct?

16 A. That's correct.

17 Q. And in that term sheet, you state quite clearly to the
18 publishers that one of the things that you need to have in
19 order to sell books at realistic prices is that all resellers
20 of new titles need to be in agency model, correct?

21 A. That's correct.

22 Q. And when you say, "All resellers of new titles need to be
23 in agency model," you're not just talking about Apple, correct?

24 A. That's correct.

25 Q. You're talking about Barnes and Noble, Sony, Amazon and

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Cue - direct

1 other eBook retailers, correct?

2 A. That's correct.

3 Q. In other words, you were telling the publishers that they
4 had two options if they wanted to do a deal with Apple. Option
5 one was they can move all their other retailers to an agency
6 model, correct? That was one option?

7 A. I prefer if you'd finish, yes, that -- I don't view my
8 agreement as an option.

9 Q. That's fine. Your statement here gave the publishers two
10 options. No. 1, they could move other retailers to an agency
11 model; or alternatively, they could not give those retailers
12 new release eBooks. That's what you say here, correct?

13 A. Yes, that's correct. I want to be -- one second.

14 Q. Sir --

15 A. One second. I when I say that's correct, I want to be
16 clear. I'm saying for new titles if the publishers wanted a
17 deal, they needed to be in agency model, period.

18 Q. Thank you. Now, sir, is it fair to say that you personally
19 had never had an interest in competing against Amazon when it
20 comes to price?

21 A. We compete with Amazon all the time.

22 Q. But you don't want to have to compete with Amazon on price,
23 do you, sir?

24 A. I would say we don't want to compete with anybody on price.
25 As I said, we want to be competitive pricing with everybody in

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Cue - direct

1 the market.

2 Q. By competitive, you mean the same?

3 A. Or feels the same to the consumer.

4 Q. So isn't it true, sir, that one of your very first
5 communications to Mr. Jobs regarding the possibility of
6 entering an eBook -- into the eBook space actually contemplated
7 that, instead of competing with Amazon in eBooks, you would
8 simply enter into a market allocation with Amazon, whereby you
9 would allow Amazon to have books and you would take -- "you"
10 meaning Apple -- would take music?

11 A. I apologize. That's a long question. You said a lot of
12 words. So can you repeat that, please?

13 Q. Sure. Isn't it true, sir, that one of your very first
14 communications to Mr. Jobs regarding the possibility of
15 entering into the eBook space actually contemplated that
16 instead of competing with Amazon in eBooks, Apple would simply
17 enter into a market allocation with Amazon whereby Apple would
18 allow Amazon to have books and Apple would take music?

19 A. Yes, that's correct.

20 Q. And can you turn to PX27 in your binder, sir?

21 A. Yes.

22 Q. And is PX27 the document that refers to the market
23 allocation that you proposed to Mr. Jobs?

24 A. Among other things that are here, yes.

25 MR. BUTERMAN: Your Honor, we'd like to offer PX27.

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Cue - direct

1 MR. SNYDER: No objection.

2 THE COURT: Received.

3 (Plaintiff's Exhibit 27 received in evidence)

4 Q. Isn't it a fact, sir, that Apple realized that comparisons
5 to Amazon, when it came to prices, were not good for Apple?

6 A. No, that's not correct.

7 Q. Sir, can you turn to paragraph 65 of your declaration. Do
8 you have that, sir?

9 A. I do.

10 Q. And that's the first paragraph under italics that says
11 "Competitive prices: Limited 'most favored nation' clause;" do
12 you see that, sir?

13 A. I do.

14 Q. Now, you say there, "A few weeks before I sent my initial
15 proposal to the publishers, my in-house lawyer, Kevin Saul, had
16 developed an idea for price matching, most favored nation,
17 clause that would protect Apple's ability to compete on
18 prices." Do you see that?

19 A. That's correct.

20 Q. And what you're referring to there when you say "a few
21 weeks before I sent my initial proposal to the publishers," you
22 meant a few weeks before you sent the January 4th term sheet,
23 correct?

24 A. That's correct.

25 Q. And so your best understanding is that Kevin Saul developed

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Cue - direct

1 the idea for a price matching MFN sometime in, would it be
2 mid-December?

3 A. I don't know when he developed it himself. I can tell you
4 when we looked at it, when I looked at it and reviewed it, and
5 decided that was the way to go. He was working on it
6 throughout the holidays. I wasn't working with him on it.

7 Q. But you say here, sir, "a few weeks before I sent my
8 initial proposals to the publishers, my in-house lawyer, Kevin
9 Saul, had developed an idea for a price-matching, most favorite
10 nation, clause." So a few weeks before January 4th --

11 A. That's correct.

12 Q. -- puts you into December 20, around there?

13 A. Around there.

14 Q. And you knew, at that point in time, that Mr. Saul had
15 developed this price-matching MFN, correct?

16 A. I knew he was working on it, yes.

17 Q. Well, you say developed?

18 A. Yes, he's developing it.

19 Q. Okay. I'm sorry. You say developing here, but your
20 testimony isn't developing. It's developed, past tense?

21 A. Sorry. I meant it exactly the same way. It means the same
22 to me, but...

23 Q. Now, just so we're clear, this price-matching MFN was
24 clearly developed well in advance of January 4th, correct?

25 A. Again, it wasn't completed. A development is something

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Cue - direct

1 that takes a path, and so we start developing something and we
2 iterate back and forth. And so it wasn't completed fully
3 formulated to my satisfaction until post-January 4th.

4 Q. And is it your testimony, sir, that the reason that you did
5 not put the MFN into the January 4th and 5th term sheets is
6 because it wasn't fully developed by that point in time?

7 A. That's correct.

8 Q. And your testimony is that once it was developed, you could
9 then swap out the bullet point that we looked at earlier
10 regarding all retailers need to be on an agency model, correct?

11 A. It wouldn't require that. It was a different requirement;
12 so, yes, I would remove the all agency.

13 Q. Now, Apple has never had a retail price MFN in any of its
14 other content businesses; is that correct?

15 A. That's correct.

16 Q. So, sir, am I correct that once Apple had this MFN, you
17 believed that Apple was indifferent as to what any publisher
18 did with respect to moving Amazon or any other retailer to a
19 different model?

20 A. That's correct.

21 Q. And if we look at paragraph 58 of your declaration, is the
22 reason why Apple, once it had the MFN, was indifferent because,
23 as you say here, "When it came to prices, Apple cared about two
24 things, one, making our eBook prices generally lower than
25 physical book prices; and, two, making sure that our customers

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Cue - direct

1 got the lowest eBook price available in the market."

2 Is that why once you had the MFN, you no longer cared
3 what model other publishers moved or what model other
4 publishers used with other retailers?

5 A. That's correct.

6 Q. So with the MFN, Apple was assured that its consumer prices
7 would be the lowest in the market, correct?

8 A. Equal to the lowest in the market.

9 Q. Assuming that Apple actually enforced the MFN, which we
10 know that Apple didn't do consistently, correct?

11 MR. SNYDER: Objection to form.

12 THE COURT: Sustained.

13 Q. Sir, you do realize that, depending on whether Amazon was
14 on an agency model with publishers that you had entered into
15 agreements with, that that would determine whether your
16 consumers, Apple's consumers, would be paying \$9.99 for
17 New York Times best sellers and new releases or the higher
18 prices that you knew the publishers were planning on charging?

19 A. Yes, that's correct.

20 Q. So in other words, sir, when you say that you were
21 indifferent to whether the publishers moved Amazon to a
22 wholesale model, what you're really saying is that you, Apple,
23 are indifferent to the actual prices that Apple's consumers
24 were paying, correct?

25 A. That's not correct.

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Cue - direct

1 Q. You were indifferent as to whether your consumers paid
2 \$9.99 for New York Times best sellers and new releases as
3 opposed to \$14.99, correct?

4 A. For the books that -- In the deal that I cut, that's
5 correct.

6 Q. All you cared about was that they couldn't be available
7 anywhere else cheaper?

8 A. Also not correct.

9 Q. Isn't it true that you believed -- strike that.

10 Isn't it true, sir, that Apple had made the
11 determination that it was fine with its consumers paying
12 \$14.99 for books that had previously been available for \$9.99,
13 as long as no consumer in the United States could find that
14 book for less than 14.99?

15 A. You can -- It's an accurate statement. It's not the way
16 that I would have said it, but it's an accurate statement.

17 Q. So just to back up, sir. If I understand correctly, early
18 January, January 4th and 5th, Apple wanted all resellers to be
19 on an agency model, correct?

20 A. That's correct.

21 Q. But at some point after that, Apple decided that as long as
22 it had an MFN, it didn't care what others did vis-a-vis Amazon,
23 correct, the other publishers did?

24 A. Sorry, I --

25 Q. You know what, it was too broad.

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Cue - direct

1 A. It was too broad.

2 Q. Let me do it again. At some point after Apple sent out its
3 January 4th and January 5th term sheets, Apple decided that as
4 long as it had the retail price MFN, it didn't care what model
5 the other publishers maintained or had with Amazon or any other
6 retailer, correct?

7 A. That's correct.

8 Q. Sir, isn't it true that, actually, Apple at all times cared
9 what model the other retailers were on?

10 A. No, that's not true.

11 Q. Isn't it true, sir, that what actually happened was that
12 Apple realized that the condition that it had put in the
13 January 4th and 5th term sheets, that all resellers need to
14 move to an agency model, was a term that it couldn't legally
15 enforce and, therefore, it replaced it with the MFN?

16 A. No, that is not true.

17 Q. Sir, do you recall receiving an e-mail from Mr. Moerer on
18 or about January 10th -- January 9th, excuse me, 2010, asking
19 you a series of questions regarding what the deal that you were
20 proposing would require?

21 A. From whom?

22 Q. Let me look at PX487 and, hopefully, that will refresh your
23 recollection.

24 A. I'm sorry, what was the number again?

25 Q. PX487.

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Cue - direct

1 A. Thank you. Yes, I do.

2 Q. And, sir, do you recall having this exchange with
3 Mr. Moerer?

4 A. I do.

5 Q. Just bear with me one second, sir.

6 And you testified about this exchange in paragraph 68
7 of your declaration, correct, sir?

8 A. One second. Yes, I did.

9 Q. And what you say in paragraph 68 is that, "On January 10th,
10 2010, Keith Moerer sent me an e-mail relaying Random House's
11 questions on this topic - specifically, whether Random House
12 could move to agency with Apple and remain on wholesale with
13 Amazon. I told Keith to let Random House know that we did not
14 care whether Random House stayed on a wholesale model with
15 Amazon or other retailers. Apple's only concern, as I
16 explained, was on Apple's price to the consumer. Specifically,
17 Random House asked (as Keith repeated it to me) 'Are we willing
18 to accept an agency model if other retailers continue a
19 standard wholesale model for new releases without holdbacks?'
20 I responded, 'We are ... what we care about is price.' So the
21 contract will say we get it at 30 percent, less whatever the
22 lowest retail price out in the market is (whether agency or
23 wholesale)." Did I read that correctly, sir?

24 A. You did.

25 Q. Now, sir, you have PX487, which is the same, I'll represent

D6DPUSA3

Cue - direct

1 to you, the same e-mail as what's here, DX140.

2 A. I agree.

3 Q. You agree, good. The quote referring to your statement
4 that's in paragraph 68 of your declaration is not accurate, is
5 it, sir?

6 A. It's accurate. I believe it is.

7 Q. Sir, your quote in paragraph 68 reads, "I responded, 'We
8 are ... what we care about is price," and then you go on; is
9 that correct?

10 A. That's correct.

11 Q. And what did you actually tell Mr. Moerer on January 10th
12 when you responded to him?

13 A. "I don't think we can legally force this."

14 Q. I don't think we can legally force this. That's why --
15 that's why, sir, Apple moved to an MFN instead of the explicit
16 term, correct?

17 A. That's correct.

18 Q. And that's why Apple stopped talking about the move all
19 resellers to an agency model, correct?

20 A. That's correct. Again --

21 Q. So --

22 A. We --

23 Q. Sir?

24 MR. SNYDER: Your Honor, the witness was in the middle
25 of an answer.

D6DPUSA3

Cue - direct

1 THE COURT: Let me ask you, Mr. Cue. Could you fairly
2 answer with a yes or no the question that was placed to you?

3 THE WITNESS: If it's the words, if those words are
4 the words that are written and he's asking me the question if
5 those are the words that are written, yes.

6 If he's asking me what those mean and what the
7 representation of that is, based on his previous question which
8 he alluded to, then, you know, I need to explain what those
9 words are. That's my only...

10 THE COURT: Okay. So --

11 THE WITNESS: He asked me earlier on --

12 THE COURT: Let me just try to capture the question
13 here. There were a chain of questions.

14 THE WITNESS: Right.

15 THE COURT: And then we lead up to, And that's why
16 Apple stopped talking about the move all resellers to an agency
17 model, correct?

18 THE WITNESS: My answer wasn't the previous
19 question -- sorry. I apologize, your Honor. It wasn't to the
20 legal question that he asked me earlier, whether I had stopped
21 this because it wasn't -- it was illegal to do it.

22 My issue here was when I was doing the deal for an
23 all-agency model, I had a position now where I was requiring
24 all of the publishers to move to an all-agency model, and I
25 came to the conclusion of what happens if that doesn't happen?

D6DPUSA3

Cue - direct

1 What happens if they don't get that?

2 Because you -- because I put it in an agreement, it
3 doesn't force them to do it. And so if they're not successful
4 in doing it, I've got an agreement that doesn't work anymore.
5 And so what I'm saying here is I don't think we can legally
6 force this because even if I have it in the agreement, I can't
7 force them to sign that agreement with somebody else.

8 And so, yes, I didn't think that we could legally
9 force someone or someone else to sign an agreement.

10 BY MR. BUTERMAN:

11 Q. Sir, even after you sent out your January 11th, 2010,
12 contract, initial contract that had the MFN provision in it,
13 you continued to keep track of which publishers were willing to
14 go to an agency model, not only with Apple, but with all other
15 retailers, correct?

16 A. I didn't keep track. Some of them shared that information
17 with me.

18 Q. And you found that information so important that you shared
19 it with Mr. Jobs, correct?

20 A. That's correct, because they didn't want to sign the MFN.

21 MR. BUTERMAN: Move to strike.

22 THE COURT: It is stricken.

23 Q. Sir --

24 A. Sorry.

25 Q. -- you shared that information with Mr. Jobs, did you not,

D6DPUSA3

Cue - direct

1 because you knew that Mr. Jobs was very keen on making sure
2 that all of the publishers moved to an agency model with
3 Amazon, correct?

4 A. That is not correct.

5 Q. Let me ask you something, sir. It's your testimony that
6 once you put the MFN in the contract, Apple was indifferent as
7 to what model it ended up with -- excuse me, what model the
8 publishers dealt with -- strike that.

9 After Apple put the MFN in its agreement, it no longer
10 cared what model the publishers operated on with their other
11 retailers, correct?

12 A. That's correct.

13 Q. Apple was indifferent at that point, correct?

14 A. That's correct.

15 Q. You were talking to the publishers, were you not, sir?

16 A. Sorry, at which time?

17 Q. During this six-week period?

18 A. Yes.

19 Q. You were negotiating with them?

20 A. That's correct.

21 Q. They explained to you the economics of their industry,
22 correct?

23 A. That's correct.

24 Q. They explained to you the economics of the MFN that you
25 were proposing, correct?

D6DPUSA3

Cue - direct

1 A. We explained it mostly to them; so I -- it was our MFN; so
2 we were explaining how the MFN worked to them.

3 Q. Did you believe -- I know that you -- Let me back up.

4 I know that you believe that Apple was indifferent.
5 Did you believe the publishers were indifferent to what model
6 they ended up on as a result of your MFN?

7 A. Some of them said that they were looking at doing an agency
8 model and doing a wholesale model.

9 Q. My question was, did you believe that the publishers were
10 indifferent to what model they used with Amazon?

11 A. I didn't think about it. I didn't -- It's not something I
12 cared about.

13 Q. Now, we established that what model they were on with
14 Amazon would impact the prices that would be charged at your
15 bookstore, correct?

16 A. Possibly, that's correct.

17 Q. And still your testimony is, you didn't care?

18 A. No, I don't care.

19 Q. Do your consumers care, sir?

20 A. Our consumers were protected by my price points and what I
21 had agreed to; so, yes, my consumers cared, and I cared about
22 the prices that I could set books at.

23 Q. Did you care about the fact that if your consumers wanted
24 to buy a Macmillan book and Macmillan had moved to an agency
25 model with Amazon, that that book, New York Times best seller,

D6DPUSA3

Cue - direct

1 might be 14.99, but if Macmillan stayed on wholesale model with
2 Amazon, that book, because of your MFN, would be 9.99? Did you
3 care about that, sir?

4 A. Sorry, I'm not sure what you're asking me I care about.
5 Can you repeat it?

6 Q. Do you care about the fact that Apple consumers paid 12.99
7 and 14.99 for New York Times best sellers and new releases that
8 they otherwise, if not for Apple, could have had for 9.99?

9 A. That's a lot of speculation of what may or may not have
10 happened based on the agreement; so I don't know. I was
11 worried about what our consumers were paying in the deal that I
12 struck with the publishers, and I thought we were going to
13 treat our consumers very, very fairly, and I had an MFN that
14 protected me in case I was wrong.

15 Q. Who protected them, sir?

16 A. I did.

17 Q. By charging them higher prices?

18 A. No, by charging them great prices at a great book selection
19 on books that weren't available elsewhere, in a better
20 bookstore. We gave them a great offer.

21 Q. You saw an example earlier of somebody who didn't
22 necessarily agree with you, who wrote an e-mail to Mr. Jobs
23 complaining about the book prices and the fact that the book
24 prices were going up; do you remember that?

25 A. I do.

D6DPUSA3

Cue - direct

1 Q. Do you recall similar complaints by customers?

2 MR. SNYDER: Objection.

3 THE COURT: Overruled.

4 A. I don't recall very many, but I'm sure there could be more.

5 Q. Do you recall customers coming up to you and saying, thank
6 you for raising eBook prices?

7 A. I remember customers calling me, thank you for creating an
8 iBookstore, yes.

9 Q. Do you recall customers saying thank you for raising my
10 eBook prices?

11 A. They wouldn't have to. They say it as thank you for
12 creating the bookstore. It's all part of it.

13 Q. I think we offered this earlier, sir --

14 A. One last --

15 Q. Just --

16 A. Sorry, one last thing. I didn't raise prices.

17 Q. No, you just gave them the opportunity to raise prices?

18 A. The publishers decide the price, and I did give them the
19 opportunity, if they wanted to raise prices, to raise them.

20 Q. In fact, sir, not only did you give them the opportunity
21 with your initial price caps, but then you subsequently even
22 raised them higher, correct, in order to get your deal done?

23 A. Slightly, yes, that's correct.

24 Q. And the reason why you gave them higher price caps was
25 specifically so that you, Apple, could ensure that you would

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Cue - direct

1 get your 30 percent margin -- excuse me, your 30 percent
2 commission that you wanted on the deal, correct?

3 A. No, that is not correct.

4 Q. Isn't it true, sir, that in order to make sure that you got
5 the 70/30 split that you wanted on eBooks, which the
6 publishers -- let me back up.

7 The publishers fought you very hard on the 70/30
8 split, correct?

9 A. Among many things, yes.

10 Q. They wanted a lower split; they wanted something that gave
11 them a greater percentage and a lower percentage for Apple,
12 correct?

13 A. That's correct.

14 Q. And they fought vehemently on that, did they not?

15 A. Among many things, as I said, yes, that's correct.

16 Q. In some cases they wanted a 10 percent commission for
17 Apple, and others they wanted a 15 percent, others wanted a 20,
18 correct?

19 A. That's correct.

20 Q. And in order to not have to give them a lower commission,
21 you gave them higher price tiers, correct?

22 A. That's not correct.

23 Q. Because what happened was the publishers told you, did they
24 not, that the economics of the deal were so poor for them, that
25 they needed one of two things from Apple; they either needed to

D6DPUSA3

Cue - direct

1 be making more money per book in terms of a bigger slice of
2 that pie or, alternatively, they needed the ability to price
3 books higher; is that fair, sir?

4 A. That's one of the many arguments they tried to use.

5 Q. And in order to make sure that you didn't have to vary from
6 the 30 percent commission that Apple wanted, you, in fact, gave
7 them higher price tiers, correct?

8 A. Again, that's not correct.

9 Q. Mr. Cue, I'm going to hand you a copy of your deposition
10 from March of 2013.

11 A. Thank you.

12 Q. And do you recognize that as your deposition transcript,
13 sir?

14 A. I believe so, yes.

15 Q. Of day one of your deposition transcripts?

16 A. Yes, that's correct.

17 Q. And I want to see if I can refresh your recollection first,
18 here; so if you would do me the favor of turning to Page 74 and
19 75. It's a long question, which is why I want to see if we can
20 cut through this. The question actually begins on Page 73.

21 A. Yes.

22 Q. So, sir, you can close that up. Does that refresh your
23 recollection as to whether one of the issues that you were
24 willing to negotiate with the publishers on, in exchange for
25 maintaining the 30 percent commission, were higher price tiers?

D6DPUSA3

Cue - direct

1 MR. SNYDER: Objection.

2 THE COURT: Overruled.

3 A. No, it doesn't.

4 Q. Okay. Now, sir, if we look at PX34 --

5 A. Are we done with this one? Sorry. So I can move it?

6 Q. Yes. You can just leave that off the side. You may have
7 to come back to it.

8 A. Okay. Sorry, the number again?

9 Q. PX34. And, sir, you understand PX34 to be an e-mail from
10 yourself to Mr. Jobs dated January 14th, 2010, correct?

11 A. I do.

12 Q. And in this e-mail, you were asking Mr. Jobs for permission
13 to offer the publishers higher price tiers than you had
14 initially offered both in your term sheet and in your draft
15 contract in order to get the deal done, correct?

16 A. That's correct.

17 MR. BUTERMAN: We'd like to offer PX34 into evidence,
18 your Honor.

19 MR. SNYDER: No objection.

20 THE COURT: Received.

21 (Plaintiff's Exhibit 34 received in evidence)

22 Q. Now, Mr. Jobs approved your request for higher price tiers,
23 correct?

24 A. After a discussion with me, that's correct.

25 Q. Right. And we touched upon this during your deposition; so

D6DPUSA3

Cue - direct

1 I want to make sure that we accurately do this now. Could you
2 turn to PX55 in your binder?

3 A. Yes.

4 Q. And am I correct, sir, that you do not know whether or not
5 you ever received PX55?

6 A. No, you are not correct.

7 Q. Okay. Do you recall receiving PX55?

8 A. No, I do not.

9 Q. What is PX55?

10 A. Well, I've seen this for the first time yesterday; so I can
11 describe it's an e-mail from Steve that was a draft of some
12 kind because I never received it. I saw the e-mail in the
13 package yesterday.

14 Q. I'm sorry, sir. How do you know that you never received
15 it?

16 A. I would have remembered if I had received this e-mail, and
17 I would have called Steve. Steve and I interacted very closely
18 together; so if I had received this e-mail, I would have
19 responded to him because it was incorrect.

20 Q. Do you recall testifying about this document during your
21 deposition?

22 A. I don't recall, but I may have.

23 Q. You were, in fact, shown this document during your
24 deposition; were you not, sir?

25 A. Again, I don't recall, but I may have. I was shown many

D6DPUSA3

Cue - direct

documents.

Q. And do you recall testifying that you weren't sure whether you had seen it or not?

A. Again, I don't recall. I didn't receive this.

Q. This document accurately reflects what Mr. Jobs thought, as far as you knew, on January 14th, 2010, correct?

A. I don't know what Mr. Jobs thought at this moment in time; so...

Q. In the document, Mr. Jobs writes to you, "I can live with this, as long as they move Amazon to the agent model too for new releases for the first year. If they don't, I'm not sure we can be competitive." Do you see that?

A. I do.

Q. Do you recall ever having a conversation with Mr. Jobs on or around this time regarding this topic?

A. About being competitive, yes, we discussed the MFN.

Q. Did you ever discuss with Mr. Jobs the fact that you didn't believe that Apple needed to move Amazon to an agency model?

A. I did.

Q. You clarified for Mr. Jobs something that was confusing to him?

A. Not confusing. Once I explained it to him, I don't think he was confused.

Q. And when did you explain this to him, sir?

A. Several times. I did it the first time before I sent the

D6DPUSA3

Cue - direct

1 contract agreement out, which was -- I can't remember the exact
2 date. I'm sure you have it, but somewhere in mid-January when
3 I sent the -- When I sent the contract, I had discussions with
4 him before I sent that contract.

5 And as we were modifying the agreement, he was very
6 concerned about whether, if we entered into an agency model
7 with the publishers, we were going to be able to compete. And
8 I explained to him again how the MFN model worked that would
9 allow us to compete on pricing.

10 Q. So you had to explain to Mr. Jobs on multiple occasions why
11 it was that what he wrote in PX55 was not important?

12 A. Well, I didn't explain it based on what he wrote. I
13 explained it based on the discussion we were having. As I
14 said, I never saw this; so it wasn't based on this e-mail.

15 Q. So let me ask you a question. After you explained to
16 Mr. Jobs the way the MFN was going to work, did Mr. Jobs become
17 indifferent as to whether publishers moved Amazon to an agency
18 model or not?

19 A. He did.

20 Q. And to your best knowledge, when did that occur?

21 A. Sorry?

22 Q. To your best knowledge, when did that occur?

23 A. Again, I explained it to him before I sent the agreement,
24 and we had several conversations about it afterwards, and so
25 probably within -- probably discussed it over a two-week period

D6DPUSA3

Cue - direct

1 several times.

2 Q. Is it fair to say, sir, that by the time the agreement was
3 signed, Mr. Jobs understood how it was going to work?

4 A. Sure.

5 Q. Is it fair to say that by the time negotiations really --
6 is it fair to say that by January 21st, Mr. Jobs had a good
7 understanding of how the agreement was going to work with
8 respect to the MFN?

9 A. I believe so.

10 Q. Now, you recall that Mr. Jobs had some communications with
11 James Murdoch in late January, correct?

12 A. I do.

13 Q. And Mr. Jobs was trying to help convince HarperCollins to
14 do a deal with Apple, correct?

15 A. That's correct.

16 Q. And could you turn to PX32?

17 A. Yes.

18 Q. Okay. So this e-mail was from January 24th. I'm looking
19 at the e-mail from Mr. Jobs to Mr. Murdoch, January 24th, 2010.
20 Okay? Do you see that?

21 A. Yes.

22 Q. And by this point in time, sir, it's your testimony that
23 Mr. Jobs understands how the MFN is going to work, correct?

24 A. That's correct.

25 Q. Now, Mr. Jobs, in this e-mail, tells HarperCollins, tells

D6DPUSA3

Cue - direct

1 Mr. Murdoch that he believes that HarperCollins has the
2 following choices. The first choice is to "throw in with Apple
3 and see if we can all make a go of this to create a real
4 mainstream eBooks market at 12.99 and 14.99;" do you see that?

5 A. I do.

6 Q. The second option is "to keep going with Amazon at 9.99;"
7 do you see that, sir?

8 A. I do.

9 Q. Okay. So if Mr. Jobs understood the MFN like you testified
10 that he did, Mr. Jobs would know that there's no possible way
11 that HarperCollins and Apple could create a mainstream eBook
12 market at 12.99 and 14.99 unless they moved Amazon to an agency
13 model too, correct, sir?

14 A. That's not correct.

15 Q. Sir, if Amazon stayed on an wholesale model and Apple and
16 HarperCollins signed a deal, then no matter what kind of market
17 Mr. Jobs and Mr. Murdoch wanted to set for eBook prices, your
18 MFN that Mr. Saul drafted, would bring the prices back down to
19 whatever Amazon's prices were, correct?

20 A. You're not correct.

21 Q. That's not the way that the MFN worked?

22 A. No, but it is -- there's pieces of it. So HarperCollins
23 was withholding books from Amazon, and so those books would
24 have been available in our store at 12.99 and 14.99, at our
25 prices, and they would not have been available at Amazon at

D6DPUSA3

Cue - direct

1 all.

2 And so we would have established a price point of
3 12.99 and 14.99 and Amazon could have continued using a
4 wholesale model at prices of 9.99 for those books and, yes, for
5 those books we would have a 9.99, but we would have established
6 a marketplace of 12.99 and 14.99; so Mr. Jobs is correct.

7 Q. So in other words, Mr. Jobs is correct because the deal
8 that you proposed gave HarperCollins two options with respect
9 to Amazon, either move them to the agency model or they were
10 not going to get the new releases that Apple was going to get,
11 correct?

12 A. It wasn't our deal. That was the deal that the publishers
13 had. They were the ones withholding. They started doing that
14 before we ever arrived; so...

15 Q. And on January 24th, 2010, before the deal is ever signed,
16 Mr. Jobs knew exactly how that was going to play out, didn't
17 he?

18 A. I believe so. Sure. He's a smart guy.

19 THE COURT: So this is quarter to 1:00. We're going
20 to break. You may step down, Mr. Cue.

21 THE WITNESS: Thank you, your Honor.

22 (Witness excused temporarily)

23 THE COURT: We'll resume at 2:00. And, counsel, I'm
24 afraid I have a couple of matters during our break. You don't
25 have to clear the tables, but you should be aware that other

D6DPUSA3

Cue - direct

1 people will be in the courtroom at the tables. Thanks so much.

2 See you at 2:00.

3 (Luncheon recess)

4 (Continued on next page)

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AFTERNOON SESSION

2:00 p.m.

EDDY CUE, resumed.

MS. OXENHAM ALLEN: Your Honor, I'm Sarah Oxenham Allen for the plaintiff states and I just wanted to bring up one quick matter before we resume with Mr. Cue, if that's all right.

THE COURT: I'm sorry. Mr. Buterman, are you done with your examination?

MR. BUTERMAN: No, I'm not, your Honor.

THE COURT: Okay. No. Make your application I was just trying to understand what's happening.

You had an application independent of the examination of Mr. Cue?

MS. OXENHAM ALLEN: Yes, ma'am. I just wanted to inform you of something --

THE COURT: Can you spell your name for the record please.

MS. OXENHAM ALLEN: My name?

THE COURT: Yes.

MS. OXENHAM ALLEN: SARAH OXENHAM ALLEN.

Your Honor, we are -- the plaintiffs are very cognizant of the limited time remaining in the trial for both sides to present their cases and we are confident that we have everything in the record we need from Doctors Ashenfelter and

D6D9USA4

1 Gilbert. So because there is significant overlap between
2 Dr. Baker's testimony and Dr. Gilbert's testimony, the
3 plaintiffs intend to forego offering Dr. Baker's testimony at
4 this time and rely on Doctors Gilbert and Ashenfelter unless
5 your Honor feels like she needs to hear from Dr. Baker.

6 THE COURT: No, I don't. Thank you very much for
7 putting that on the record.

8 DIRECT EXAMINATION CONTINUED

9 BY MR. BUTERMAN:

10 Q. Good afternoon, Mr. Cue.

11 A. Good afternoon, sir.

12 Q. Mr. Cue, were any of the ultimately executed Apple agency
13 agreements with the five publishers in January of 2010
14 materially different from one another?

15 A. Not from Apple's perspective.

16 Q. Now, Mr. Cue, do you recall a dinner that took place on
17 January 20 that you attended with others from Apple and from
18 Macmillan?

19 A. I do.

20 Q. And who attended that dinner?

21 A. I believe Kevin Saul from my team, Keith Moerer from my
22 team, John Sargent from Macmillan, and the name doesn't ring a
23 bell but I'm sure you can remind me of the other person from
24 Macmillan and I can validate it.

25 Q. That's all right.

D6D9USA4

Cue - direct

1 Do you recall that during that dinner the topic came
2 up -- the topic of the Apple deal came up?

3 A. We were negotiating the deal so the reason we were having
4 the dinner was the whole deal.

5 Q. And do you recall that during that dinner one of the
6 matters that was discussed was how Macmillan would be operating
7 with its other retailers after it did the deal with Apple?

8 A. I don't recall that as being an issue in the agreement at
9 all -- in the dinner at all.

10 Q. Do you recall that Mr. Sargent explained to you at the
11 dinner that Macmillan planned to offer both a wholesale and an
12 agency model?

13 A. Yes.

14 Q. And do you recall that you explained to Mr. Sargent during
15 that dinner that the Apple deal that you were going to sign
16 with Macmillan would not allow him to both have a wholesale
17 model with Amazon and an agency model with Apple?

18 A. That's not correct.

19 Q. Could you turn to PX37 in your binder, sir.

20 You have PX37, sir?

21 A. I do.

22 Q. You recall PX37 as an e-mail exchange between yourself and
23 Mr. Sargent on the morning following your dinner on January 20?

24 A. It started on an e-mail from the -- from myself sending it
25 to him that night.

D6D9USA4

Cue - direct

1 Q. Thank you for the clarification.

2 You see that in the e-mail that Mr. Sargent writes to
3 you at 6:55 a.m. he writes, "The stumbling block is the single
4 large issue that we clearly had a misunderstanding about. I
5 was clear in my head with what your position was. Brian was
6 clear as well after his discussion with Keith. Somehow, it
7 seems we misread you. Please understand that it is significant
8 enough for us that we may, in fact, give you a no later today.
9 And only in working through the contract will we be sure we
10 actually understand every aspect of your proposal. More a bit
11 later."

12 Did I read that correctly, sir?

13 A. You did.

14 Q. Can you tell me what the stumbling block was that
15 Mr. Sargent was referring to in this e-mail?

16 A. I can.

17 He was referring to the fact that he wanted to be able
18 to do one-offs and marketing campaigns that -- where the MFN
19 would not apply. So he was very confused on whether the MFN,
20 the way we had written it, would allow him to do anything with
21 any other retailer where the MFN wouldn't apply. And I had
22 told him that we were okay if they wanted to do one-time
23 promotions or, you know, special offers, things that I didn't
24 view as the normal practice of selling the book.

25 Q. Sir, do you recall being asked this specific question

D6D9USA4

Cue - direct

1 during your deposition? About this document?

2 A. I don't.

3 Q. Do you recall not being able to recall what this e-mail was
4 about at the time?

5 A. I don't.

6 MR. BUTERMAN: Could you please play clip 38, with the
7 Court's permission.

8 The pages are 307, line 12 through 309, line 25.

9 "Q. Now I want to move forward to Mr. Sargent's response to
10 you on January 21st. And the second paragraph, he says, 'I
11 will get our lawyers working today with Kevin. I know the
12 clock is ticking. I'm willing to give up on many of the points
13 I think we were being absolutely reasonable to ask for.
14 Remarkable that you guys say no to everything and still appear
15 somehow to be reasonable.'

16 "He says in the next sentence, 'The stumbling block is
17 the single large issue that we clearly had a misunderstanding
18 about. I was clear in my head with what your position was.
19 Brian was clear as well after his discussion with Keith.
20 Somehow it seems we misread you. Please understand that it is
21 significant enough for us that we may, in fact, give you a no
22 later today, and only in working through the contract will we
23 be sure we actually understand every aspect of your proposal.
24 More a bit later.'

25 "Did I read that correctly?

D6D9USA4

Cue - direct

1 "A. You did.

2 "Q. Can you explain to me what the 'single large issue' is
3 that Mr. Sargent is referring to in that e-mail?

4 "A. I don't recall, but I recall what John -- again, the big
5 issues that we ended up fighting for were the tiers and the
6 MFN. And so I don't recall which -- during this particular
7 cycle, or this particular issue, what he referred to.

8 "Because as we went back and sat down with them on the
9 agreement and were negotiating back and forth, those remained
10 issues through the 11th hour. As a matter of fact, he wanted
11 exceptions to the tiers that he wanted to create for certain
12 types of books. And so -- but I don't recall exactly what
13 his -- in this particular, what was -- what was the thing that
14 he misunderstood, you know, from the agreement.

15 "Q. So if you look at your response to Mr. Sargent, you say,
16 'I understand. I don't believe we're asking you to do anything
17 you haven't told us you were doing already. We're just trying
18 to get a commitment '

19 "Does that help refresh your recollection as to what
20 the topic was that you were discussing with Mr. Sargent?

21 "A. It -- you know, it makes me feel like it's pricing tiers,
22 but I don't know that for a fact. I don't recall. And the
23 only reason I say pricing tiers is only because I would view
24 that they already priced their books at different prices based
25 on the tiers, but I don't -- again, don't recall.

D6D9USA4

Cue - direct

1 "Q. Is it possible that Mr. Sargent here is referring to
2 moving to an agency agreement with Amazon?

3 "Mr. Snyder: Objection to form.

4 "A. I -- I -- there is no way it's about that.

5 "Q. No way?

6 "A. No way."

7 BY MR. BUTERMAN:

8 Q. That was your testimony during your deposition, sir?

9 A. That's correct.

10 Q. That deposition took place only a couple months ago?

11 A. That's correct.

12 Q. And during that deposition you said that you didn't recall
13 what this stumbling block issue was but that it might relate --
14 your best guess was that it related to pricing tiers, correct?

15 A. That's correct.

16 Q. And now you're saying, sir, that it actually relates to
17 one-off promotions relating to the MFN?

18 A. That's correct.

19 Q. What happened between your deposition and now that has
20 caused you to change your opinion?

21 A. As I was reading and going over all of the documents, one
22 document that you didn't show me was -- I had asked Kevin that
23 night, after the dinner when I sent him the thank you, I asked
24 Kevin, Can you please send a document to his attorney or Brian
25 and John to clarify the point. And so as I read that document

D6D9USA4

Cue - direct

1 at the same time that this was going on, it recollected my
2 position of what this was about as I had told Kevin to do it
3 and Kevin responds to Brian in agreement about this.

4 Q. So, in other words, in meeting with your lawyers in
5 preparation for your testimony you changed your answer from
6 your deposition, correct, sir?

7 MR. SNYDER: Objection to form.

8 THE COURT: Sustained.

9 THE WITNESS: That's not correct.

10 THE COURT: You didn't have to answer. The question
11 was stricken.

12 THE WITNESS: I'm sorry. I apologize.

13 THE COURT: No problem.

14 Q. Now you say in the e-mail, "I don't believe we're asking
15 you to do anything you haven't told us you are doing. We are
16 just trying to get a commitment."

17 Is it your testimony that allowing Macmillan to do a
18 one-off promotions somehow relates to getting a commitment from
19 them?

20 A. Absolutely. I wanted a commitment from the number of books
21 that he could do one-off promotions from.

22 Q. Now, are you aware, sir, that on January 20 John Sargent,
23 before he had dinner with you, met with Russ Grandinetti of
24 Amazon?

25 A. No, I was not.

D6D9USA4

Cue - direct

1 Q. And are you aware, sir, that on January 20 in a meeting
2 with Russ Grandinetti John Sargent indicated that he was
3 working on an agency model but his plan was to offer both an
4 agency model and a wholesale model. Were you aware of that
5 sir?

6 A. I wasn't aware that he was talking to Amazon. He had made
7 me aware that he wanted to offer both models.

8 Q. And sir, could you turn to PX482 in your binder.

9 I just want to make sure that we have the timeline
10 correct here. So, on January 20 there is a meeting between
11 Mr. Grandinetti and Mr. Sargent.

12 Do you see that? If you look at the third page of the
13 document.

14 A. Sorry. Can you refer to me -- what was the number again?

15 Q. It's PX482 and it's the third page of the document.

16 A. Okay.

17 Q. Under the heading Macmillan. Do you see that, sir?

18 A. I do.

19 Q. And so on January 20 you see that there's a meeting between
20 Mr. Grandinetti and Mr. Sargent?

21 A. (No response).

22 Q. "Russ met with John Sargent in New York."

23 Do you see that sir?

24 A. I do.

25 Q. And do you see there that John -- it says "John indicated

D6D9USA4

Cue - direct

1 that he was working on an agency model but his plan was to
2 offer both an agency and a reseller model".

3 Do you see that, sir?

4 A. I do.

5 Q. And then that night was the night that you had dinner with
6 Mr. Sargent, correct?

7 A. I believe that's correct, yes.

8 Q. And the following -- well that evening, starting that
9 evening you sent an e-mail to Mr. Sergeant, which results in
10 Mr. Sargent sending you an e-mail the morning of January 21
11 talking about a very large stumbling block in the deal,
12 potentially, correct?

13 A. That's correct.

14 Q. And you tell Mr. Sargent in response, "I understand. I
15 don't believe we're asking you to do anything you haven't told
16 us you are doing. We are just trying to get a commitment."

17 You saw that?

18 A. I did.

19 Q. Now if you look at PX482 do you see that there's a heading
20 under January 21 in the Macmillan -- under Macmillan?

21 A. I do.

22 Q. Do you see that it says, "January 21. John and Russ by
23 phone. John realized that the Apple contract required him to
24 only offer the agency model only and wanted to talk through
25 options with Russ."

D6D9USA4

Cue - direct

1 Do you see that?

2 A. I do.

3 Q. Now, sir, is it still your testimony that during the dinner
4 that you had with Mr. Sargent and others on January 20 you did
5 not inform them that if Macmillan did a deal, an agency deal
6 with Apple, it had to move Amazon to an agency model?

7 A. That's correct. I did not.

8 Q. Just so we're clear. Your belief is that the large
9 stumbling block in this e-mail back and forth between you and
10 Mr. Sargent is about doing one-off promotions?

11 A. And the number of commitments. Yes. That's correct.

12 Q. Sir, could you turn to PX42, please.

13 PX42, sir, is your update of your negotiations that
14 you wrote to Mr. Jobs, correct?

15 A. That's correct.

16 Q. And it's dated January 21, 2010, correct?

17 A. That's correct.

18 Q. So it's the day after you have your dinner with Mr. Sargent
19 where you talked about the one-off promotions, correct?

20 A. Correct.

21 Q. Which was a big stumbling block that almost cratered your
22 deal, correct?

23 A. It's one of the stumbling blocks. That's correct.

24 Q. If you look at the Macmillan section of this document it
25 reads as follows, "After a long afternoon with their general

D6D9USA4

Cue - direct

1 counsel, we are in agreement with -- agreement on the terms but
2 the CEO and GC have legal concerns over the price matching. He
3 is going to his outside counsel tomorrow morning. We need him
4 to sign off because he was one I was counting on. I am meeting
5 with him at 10:30 a.m. to make a final go/no-go decision."

6 Did I read that correctly, sir?

7 A. You did.

8 Q. Now, if you look at the top of your e-mail to Mr. Jobs,
9 you're informing Mr. Jobs that you're confident that they --
10 that you have two even though they have not yet signed; is that
11 correct?

12 A. That's correct.

13 Q. And you say that "They keep chickening out so I have to
14 give them a real drop dead time or they won't make up their
15 minds."

16 Do you see that?

17 A. (No response).

18 Q. Sir?

19 A. Yes, I do.

20 Q. And you say, "In the end they want us and see the
21 opportunity we give them but they're scared to commit."

22 Do you see that?

23 A. I do.

24 Q. "It's less to do with the terms and more about the dramatic
25 business change for them."

D6D9USA4

Cue - direct

1 Do you see that?

2 A. I do.

3 Q. And was that really the issue that was going on here, sir?

4 A. That's what I believed it was.

5 Q. That you were imposing on the publishers a dramatic
6 business change to their industry?

7 A. No. Not to their industry but to the Apple agreement that
8 I was negotiating with them.

9 Q. Now, Mr. Cue, could you turn to paragraph 96 of your
10 declaration.

11 A. Yes.

12 Q. And in paragraph 96 of your declaration you write,
13 "Finally, as I have done when negotiating music, movie, and TV
14 deals for iTunes, we gave some publishers very general
15 information about how close other publishers were to signing,
16 and then how many had signed. We wanted each publisher to know
17 that we were close to meeting the minimum number for us to
18 launch to encourage them to accept."

19 Do you see that, sir?

20 A. I do.

21 Q. And is it your testimony, sir, that the reason that you
22 from time to time throughout the negotiations gave the
23 publishers information to let them know that you were close to
24 meeting the minimum number for Apple to launch was to encourage
25 them to accept the deal?

D6D9USA4

Cue - direct

1 A. Yes. That's correct.

2 Q. And Mr. Cue, isn't it true, though, that the real reason
3 that you consistently gave publishers information about who had
4 signed and who was planning on signing was because the
5 publishers were afraid of retaliation from Amazon and you
6 wanted to make sure they understood they were not going to be
7 alone in fighting Amazon?

8 A. Long question. So I hope I can answer. But I didn't give
9 the publishers any information about who had signed
10 specifically. I gave them general comments about the number
11 that had signed and the fact that I was talking to them.

12 So, no to your question if you're asking me did I give
13 them any specifics about which publisher had signed or any of
14 that.

15 Q. That wasn't my question, sir.

16 A. Sorry.

17 Q. My question was: Isn't it true that the real reason that
18 you were telling publishers that other publishers were close to
19 signing or had signed or had agreed to the deal had nothing to
20 do with a hey, guys, you know, the train is leaving, but rather
21 because you wanted to make them aware of the fact that they
22 would not have to face retaliation from Amazon because they
23 would all be moving together?

24 A. No. That's not correct.

25 MR. BUTERMAN: Can you please play clip 13.

D6D9USA4

Cue - direct

1 This is 129, 25 through 130, 11.

2 "Q. And then for the third point, did Apple launch the
3 iBookstore in part by following a business strategy that
4 involved telling publishers the number of publishers that had
5 already signed?

6 "A. No. Again, did I tell them that some had signed from that
7 standpoint, or I might have said, you know, hey we've got two
8 publishers signed, but at no point in time did we get to the
9 point of giving them the specifics or -- I just wanted to
10 assure them that they weren't going to be alone, so that I
11 would take the fear aware of the Amazon retribution that they
12 were all afraid of."

13 BY MR. BUTERMAN:

14 Q. Was that testimony true and accurate when you gave it, sir?

15 A. It is.

16 Q. Would you like to change your answer now?

17 A. No. You asked me if it was the only thing. It wasn't the
18 only reason. It was one of many reasons I gave them.

19 Q. Now, Mr. Cue, isn't it true that the reason that publishers
20 were afraid of retaliation from Amazon is because they were
21 going to move Amazon to an agency model?

22 A. I don't know that. You'd have to ask them.

23 Q. I'm sorry. I interrupted.

24 A. Sorry. You would have to ask them.

25 Q. Well, you knew that the publishers were afraid of

D6D9USA4

Cue - direct

1 retaliation from Amazon, correct?

2 A. That's correct.

3 Q. And you understood that Amazon would be retaliating for
4 some reason, correct?

5 A. I do.

6 Q. And before Apple entered into the marketplace, there were
7 other retailers who entered into the marketplace, correct?

8 A. That's correct.

9 Q. For example, Amazon was in the marketplace and then Barnes
10 & Noble entered, correct?

11 A. That's correct.

12 Q. But there was no retaliation against Barnes & Noble --
13 excuse me, against the publishers for signing deals with Barnes
14 & Noble, correct?

15 A. That's correct.

16 Q. The reason why there was a fear of retaliation that you
17 were aware of and that the publishers were aware of is because
18 you all knew that the deal that you were imposing was going to
19 change the industry from the wholesale model to the agency
20 model, correct, sir?

21 A. That's not correct.

22 Q. Now, you said a moment ago, sir, that you gave information
23 to the publishers about numbers of publishers who were close to
24 signing and things of that sort, correct?

25 A. That's correct.

D6D9USA4

Cue - direct

1 Q. But if I understand your testimony you never gave specific
2 names of publishers, correct?

3 A. I don't recall ever giving a specific name, no.

4 Q. But you did give the publishers at various points in time
5 pretty specific information, did you not?

6 A. Could you be more specific?

7 Q. Sure. Penguin. Penguin wanted some very specific
8 information from you before they would sign the contract,
9 correct?

10 A. That's correct.

11 Q. And that specific information was that they wanted an
12 assurance that they would be one of four, correct?

13 A. That's correct.

14 Q. And they didn't ask for that term to be in the contract,
15 correct?

16 A. That's correct.

17 Q. But they still wanted you to provide that information to
18 them?

19 A. That's correct.

20 Q. And, in fact, sir, you didn't tell Penguin, "I'm sorry
21 you're dealing with me one-on-one here," correct?

22 A. Sorry? Tell them that when?

23 Q. You didn't tell Penguin, "No, deal with me and sign my
24 deal"?

25 A. I tried.

D6D9USA4

Cue - direct

1 Q. But they wouldn't do it?

2 A. That's correct.

3 Q. And so you actually did what they wanted, correct?

4 A. Well I was doing what -- I was trying to sign all six
5 publishers. So, with Penguin I looked at it and said they
6 wanted to be one of four. Clearly they weren't going to be the
7 first, the second, or the third, but I was pretty optimistic if
8 I got three that they would be the fourth, and so I didn't
9 think it was a big deal.

10 Q. So you didn't think it was a big deal to wait until you had
11 three signed up and then tell Penguin, "Okay, I got the other
12 three that you wanted and now you can sign"?

13 A. That's correct.

14 Q. Did that strike you a little bit like a: I'm only doing
15 this deal if my competitors do it?

16 A. Given my experience, having done this with music, having
17 done it last week with publishers for radio, it's not unusual.
18 Nobody likes being the first to sign. Everybody thinks that
19 you get a better deal by signing last. And so I didn't find
20 Penguin's request unusual. It's something I've heard from all
21 of the media industries over time.

22 Q. Mr. Cue, I'd like to now direct you to something that we
23 started talking about earlier in the morning.

24 Could you turn to paragraph 100 of your declaration.

25 A. Yes.

D6D9USA4

Cue - direct

1 Q. I want to direct your attention to the part of paragraph
2 100 where you write, "The first time Apple had definitive
3 knowledge that a publisher was negotiating with another
4 retailer was through press reports and an e-mail from John
5 Sargent, Macmillan's CEO, on January 31, 2010 after we had
6 signed our agreements."

7 Did I read that correctly, sir?

8 A. You did.

9 Q. Now I notice in that sentence that you use a qualifier. So
10 I just want to make sure that we're on the same page.

11 When you say this was the first time that Apple had
12 definitive knowledge, what did you mean by that?

13 A. Well some of the publishers had told us that they wanted to
14 go agency. And so I didn't know whether it was a negotiation
15 tactic with us to get our deal signed or not. But this was the
16 first time I knew they had actually -- one of them had actually
17 done something about it.

18 Q. And by "done something" you mean gone out to Seattle,
19 correct?

20 A. Again, if they went to Seattle -- I mean negotiate with
21 Amazon.

22 Q. So, just so we're clear, the first time that you believe
23 Apple had definitive knowledge that a publisher was negotiating
24 with another retailer was through press reports and an e-mail
25 from John Sargent on January 31, 2010? Correct?

D6D9USA4

Cue - direct

1 A. That's correct.

2 Q. And you stand by that statement one hundred percent?

3 A. I do.

4 Q. Sir, could you turn to PX514 in your binder.

5 Sir, you have PX514?

6 A. I do.

7 Q. And you recognize PX514 to be a part of Mr. Jobs'
8 biography?

9 A. I do.

10 Q. And can you turn to page 503 of the document, sir.

11 A. Yes.

12 Q. And you see that on page 503 Mr. Isaacson reports on a
13 conversation that he had with Mr. Jobs the day after the iPad
14 launch, correct?

15 A. I do.

16 Q. And the iPad launch event was on January 27, 2010, correct?

17 A. That's correct.

18 Q. Which means that this conversation between Mr. Jobs and
19 Mr. Isaacson took place on January 28, 2010, correct?

20 A. That's correct.

21 Q. And in this conversation -- I'll just read the entire thing
22 just so, for completeness sake.

23 A. Thank you.

24 Q. Mr. Jobs writes or, excuse me, Mr. Jobs says to
25 Mr. Isaacson, "Amazon screwed it up. It paid the wholesale

D6D9USA4

Cue - direct

1 price for some books but started selling them below cost at
2 9.99. The publishers hated that -- they thought it would trash
3 their ability to sell hardcover books at \$28. So before Apple
4 even got on the scene, some book sellers were starting to
5 withhold books from Amazon. So we told the publishers, 'We'll
6 go to the agency model, where you set the price, and we get our
7 30 percent, and yes, the customer pays a little more, but
8 that's what you want anyway,' but we also asked for a guarantee
9 that if anybody else is selling books cheaper than we are, then
10 we can sell them at the lower price too. So they went to
11 Amazon and said, 'You're going to sign an agency contract or
12 we're not going to give you the books.'"

13 Did I read that correctly, sir?

14 A. You did.

15 Q. So isn't it true that as of January 28, 2010, which is days
16 before you say, in paragraph 100 of your declaration, that
17 Apple became aware of the fact that any other publisher was
18 negotiating with another retailer, Mr. Jobs was aware that
19 publishers went to Amazon and said, "You're going to sign an
20 agency contract or we're not going to give you the books"?

21 A. That's not correct.

22 Q. That's not correct, sir?

23 A. No, it is not.

24 Q. What part of it is not correct, sir?

25 A. Mr. Jobs didn't know whether any publisher had gone to

D6D9USA4

Cue - direct

1 Amazon.

2 Q. So are you saying that Mr. Jobs was not speaking accurately
3 to his biographer when he wrote, "So they went to Amazon and
4 said, 'You're going to sign an agency contract or we're not
5 going to give you the books'?"

6 A. I think he was speaking a hundred percent accurately, yes.

7 But he didn't know that publishers had gone to Amazon.
8 Mr. Jobs is a pretty smart guy. The publishers are upset.
9 Some of them had said they wanted to go to an agency model. He
10 expected them to go to Amazon. And so he said that. I would
11 have said the same thing.

12 Q. But, sir, he didn't say they are going to go to Amazon. He
13 said, "They went to Amazon and said, 'You're going to sign an
14 agency contract or we're not going to give you the books,'"
15 correct?

16 A. He did.

17 Q. And it's your testimony that Mr. Jobs did not know prior to
18 January 31 that the publishers had started to reach out to
19 negotiate with other retailers?

20 A. That's correct.

21 Q. So you know what Mr. Jobs knew?

22 A. In the book business I'm pretty sure since I was his main
23 source. There was nobody else working with the publishers. So
24 I couldn't imagine where else he would get that kind of
25 information.

D6D9USA4

Cue - direct

1 Q. So the information could only come from you, correct?

2 A. I believe so.

3 Q. And your information could only come from the publishers,
4 correct?

5 A. My information about whether they were negotiating with
6 Amazon?

7 Q. Correct. If you had information about whether a publisher
8 was negotiating with Amazon, that would have come from the
9 publishers, correct?

10 A. If I had it, that would be correct, yes.

11 Q. And you still believe that paragraph 100 of your
12 declaration is accurate?

13 A. I do.

14 Q. Now, sir, a few moments ago, and actually earlier this
15 morning as well, you testified that you learned about the
16 Macmillan Amazon dispute from press reports and an e-mail; is
17 that correct?

18 A. That's correct.

19 Q. That's in paragraph 100 of your declaration, is it not?

20 A. That's correct.

21 Q. So let's look at the documents and see if we can isolate
22 the documents that you're referring to there. Could you turn
23 to PX46 in your binder, sir.

24 Is PX46, sir, is that the e-mail that you received
25 from Mr. Sargent?

D6D9USA4

Cue - direct

1 A. Yes, it is.

2 Q. And Mr. Sargent writes to you on January 31 and he says,
3 "Morning Eddy. Sometimes it is not good to be CEO and VP
4 corporate communications. Just to make sure you are in the
5 loop. Lots of noise this morning."

6 Do you see that?

7 A. I do.

8 Q. Then you see that underneath there's a letter from John
9 Sargent to all Macmillan authors, illustrators and the literary
10 agent community.

11 Do you see that?

12 A. I do.

13 Q. And he says, "This past Thursday I immediate with Amazon in
14 Seattle," correct?

15 A. I do.

16 Q. And that's where you learned that Mr. Sargent had met with
17 Amazon in Seattle, correct?

18 A. I don't remember if it was this or the articles in the
19 paper but from one of the two.

20 Q. So let's look at the article in the paper so just make sure
21 that we're all on the same page.

22 I'm sorry. Let me just, before we move on.

23 You forward this e-mail to Mr. Jobs, correct?

24 A. I do.

25 Q. And Mr. Jobs responds by saying, "We have definitely helped

D6D9USA4

Cue - direct

1 stir things up in the publishing world," correct?

2 A. He does.

3 MR. BUTERMAN: Your Honor, we'd like to move PX46 into
4 evidence.

5 MR. SNYDER: No objection.

6 THE COURT: Received.

7 (Plaintiffs' Exhibit 46 received in evidence)

8 Q. Now could you turn to PX871, please.

9 Do you have that, sir?

10 A. I do.

11 Q. And PX871 is a January 30, 2010 e-mail from you to
12 Mr. Jobs, to which Mr. Jobs responds to, correct?

13 A. That's correct.

14 Q. And it contains an article from Publishers Deluxe Lunch
15 Blog regarding the Amazon versus Macmillan dispute, correct?

16 A. That's correct.

17 Q. And Mr. Jobs responds to your forward by saying, "Wow, we
18 have really lit the fuse on a powder keg," correct?

19 A. That's correct.

20 Q. Fair to say that Mr. Jobs was proud of what you and he had
21 done in the eBooks world?

22 A. We were proud of launching the iBookstore if that's what
23 you're asking me.

24 Q. You were proud of lighting a fuse on a powder keg in a
25 dispute with Amazon and other publishers?

D6D9USA4

Cue - direct

1 A. No, we were not.

2 Q. Would you agree with me that it's either from this article
3 on January 30, 2010 or from the e-mail from January 31, 2010
4 that you were referring to in your paragraph 100 of your
5 declaration?

6 A. I cannot. I mean there were many, many articles that were
7 written. So I don't know which one I read first. So it could
8 be this one. It could be others. I mean it was front headline
9 news as I recall.

10 Q. And it was news on January 30 and 31, correct?

11 A. I believe so. But I don't know if something leaked a
12 little earlier or not.

13 Q. Well, you say in your declaration -- make sure that we have
14 the language correct -- you say in your declaration, "The first
15 time Apple had definitive knowledge that a publisher was
16 negotiating with another retailer was through press reports and
17 an e-mail from John Sargent, Macmillan's CEO, on January 31,
18 2010 after we had signed our agreements"?

19 A. I did.

20 Q. Now, sir, isn't it true that you and Mr. Sargent actually
21 discussed his plans to go out to Seattle and make the proposal
22 to move Amazon to an agency model one week earlier than
23 January 31?

24 A. No. That is not true.

25 Q. You said it a couple times here but I want to just make

D6D9USA4

Cue - direct

1 sure we're clear.

2 Prior to seeing these articles and receiving this
3 e-mail you did not know that John Sargent went out to Seattle,
4 correct?

5 A. That's correct.

6 Q. Sir, I've handed you what's been market as PX877. This is
7 an e-mail between you and Mr. Sargent, an e-mail exchange,
8 January 27 and 28.

9 Do you see that, sir?

10 A. I do.

11 Q. And do you see that Mr. Sargent in his January 27 e-mail --
12 and January 27 was the day of the iPad launch event, correct?

13 A. Correct.

14 Q. And do you recall that during that event Mr. Jobs made a
15 statement to Mr. Mossberg where he talked about the prices of
16 books being the same?

17 A. I do.

18 Q. And isn't that what Mr. Sargent is responding to when he
19 writes, "I've spoken to the Times and the Journal. They picked
20 up on 14.95 for the Kennedy book. It is at 9.99 on Kindle. I
21 have answered questions on the price caps, tied to ink on
22 paper, and the availability of all titles. Hope the spin will
23 be all positive. Brian, please forward to the press contact at
24 Apple.

25 "Damn, that device rocks."

D6D9USA4

Cue - direct

1 Did I read that correctly sir?

2 A. You did.

3 Q. That's January 27.

4 And what do you write in response, sir? You write to
5 Mr. Sargent, "If you get back to New York Friday, I can stop
6 by," correct?

7 A. That's correct.

8 Q. Sir, is it still your testimony under oath here that you
9 did not know that on January 28, the day after the iPad launch
10 event, Mr. Sargent flew to Seattle to meet with Amazon?

11 MR. SNYDER: Objection.

12 THE COURT: Overruled.

13 THE WITNESS: That's correct.

14 Q. You seem to have some knowledge of Mr. Sargent's travel
15 plans, correct?

16 A. I do.

17 Q. Why is that, sir?

18 A. I invited him to the event. I wanted him to come out to
19 the event to see the launch of the I -- of the iPad and our
20 iBooks. We were very excited about it. We thought he would
21 love to be there at the event.

22 And he shared with me that he was not -- I don't
23 remember the comment or whatever, but he was going to be out of
24 town and not going to be available. And so, that's why I wrote
25 back to him: If you're back in New York on Friday, I wanted to

D6D9USA4

Cue - direct

1 stop by on Friday because, believe it or not, all of the
2 publishers signed the deal with us without ever seeing what an
3 iPad looked like or what an iBooks looked like. And so I
4 wanted to be the first to go to New York and show the
5 publishers what an iPad and what an iBook application looked
6 like. And so I was letting him know that.

7 Q. So, Mr. Sargent had told you that he's going to be out of
8 town, he might be back on Friday, you wanted to show him the
9 iPad, correct?

10 A. iPad and iBooks, yes.

11 Q. The iPad and iBooks.

12 I'm going to show you what's been marked as PX881.

13 A. Thank you.

14 Q. Sir, PX881 is an e-mail dated January 24, 2010. It's an
15 e-mail exchange between you and Mr. Sargent; is it not, sir?

16 A. It is.

17 Q. And as you said in your previous answer, Mr. Sargent -- or
18 it begins with, I'm sorry, you, on the bottom telling
19 Mr. Sargent, "As I recall you are not going to the event on
20 Wednesday, right? Question. Also I hope to stop by on Friday
21 to show you the device."

22 That's correct, sir, right?

23 A. That's correct.

24 Q. And Mr. Sargent responds to you by saying, "I can't make
25 the event but I'm hoping you can hook me up to watch it

D6D9USA4

Cue - direct

1 somehow. As for Friday, I hope to be in but suspect I will be
2 in Seattle or traveling back."

3 Mr. Cue, despite what you've said repeatedly today,
4 you knew that Mr. Sargent was going out to Seattle to meet with
5 Amazon, correct?

6 A. That is not correct.

7 Q. And Mr. Cue, you knew that Mr. Sargent was going out to
8 Seattle to tell Amazon that they could either move to an agency
9 agreement or they would not get his books for several months?

10 A. That is not correct.

11 Q. That is something that you and Mr. Sargent discussed days
12 before he ever went out to Seattle?

13 A. (No response).

14 Q. Correct?

15 A. That is not correct.

16 Q. You are aware that you've testified at least four times
17 this morning that you were not aware that Mr. Sargent was going
18 out to Seattle prior to January 30 or 31, correct?

19 MR. SNYDER: Objection to form.

20 THE COURT: Overruled.

21 THE WITNESS: I am. And I will keep answering it the
22 same way.

23 MR. BUTERMAN: One moment, your Honor.

24 (Pause)

25 No further questions at this time, your Honor.

D6D9USA4

Cue - direct

1 Your Honor, may I just request to move in PXs 877 and
2 881 into evidence.

3 THE COURT: Any objection?

4 MR. SNYDER: No, your Honor.

5 THE COURT: Received.

6 (Plaintiffs' Exhibits 877 and 881 received in
7 evidence)

8 CROSS-EXAMINATION

9 BY MR. SNYDER:

10 Q. Good afternoon, Mr. Cue.

11 A. Hello. Thank you.

12 Q. Mr. Cue, do you recall -- withdrawn.

13 What I'm going to do just to -- for the Court's
14 benefit, your benefit, is I'm going to work through all the
15 documents that the government showed you in the same order and
16 then I may go back to some other topics. That's the way I'm
17 going to proceed.

18 The first documents that the government showed you
19 first was Plaintiffs' Exhibit 857. I think people have
20 referred to this as the spiderweb.

21 Before court today had you seen this chart before,
22 sir?

23 A. I don't believe so.

24 Q. And I think counsel said this, these were phonecalls among
25 and between publishers at times at issue in this case?

D6D9USA4

Cue - cross

1 A. That's correct.

2 Q. And just to be clear, at any time during your negotiations
3 with the individual publishers in January of 2010 were you
4 aware that any of these calls among and between different
5 publishers were occurring?

6 A. No, I was not aware of any calls or any other form of
7 communication actually.

8 Q. And have you throughout your career, sir -- withdrawn. How
9 long have you worked at Apple?

10 A. Just over 24 years.

11 Q. And what was your role in negotiating the iTunes deals?

12 A. I was the primary business person in charge of getting the
13 deals done with the -- at the time I believe there were five
14 major labels. And so I negotiated each of those deals before
15 we went live.

16 Q. And did you play a role in the development of the app
17 store?

18 A. I did.

19 Q. What was your role?

20 A. I was also responsible for the app store as the lead
21 business person and responsible for both the development, the
22 running of it, and all the day-to-day operations.

23 Q. And when you negotiated content deals for the app store,
24 did you start -- let's go to game business, the Angry Birds and
25 games like that, did you approach the biggest gaming companies

D6D9USA4

Cue - cross

1 first to try to strike app deals with them?

2 A. What we did with the app store is we created, based on our
3 experience of creating agreements in the past with music,
4 movies, and TV shows, we've always treated everybody the same,
5 roughly the same, right. So whether you're a large music label
6 or a small music label, you get the same deals that we do.

7 So when we wanted to do the app store, we wanted to
8 take exactly the same way and treat a large developer or a
9 small developer exactly the same and so we created a template
10 agreement for the app store that we thought met the needs of
11 all of the different parties. And we created that. And
12 actually went live with that agreement. And gave it out to all
13 of the major publishers and the smaller ones too at the same
14 time.

15 Q. And I believe you testified a few moments ago that very,
16 very recently you negotiated deals for what is known as the
17 iRadio; is that correct?

18 A. iTunes Radio.

19 Q. iTunes Radio?

20 A. And yes, I just completed those negotiations last week here
21 in New York.

22 Q. And with which companies did you negotiate and what size
23 companies?

24 A. With Universal Music, Sony Music, Warner Music,
25 Warner/Chappell, Sony ATV Publishing, so the large -- the large

D6D9USA4

Cue - cross

1 major labels and publishers of music.

2 Q. By the way, during the course of those negotiations,
3 jumping ahead to a subject but it sparked my memory, did you at
4 any time tell any one music publisher that one is in, two is
5 in, three is in, that kind of same negotiating tactic that you
6 used with Penguin that was discussed earlier?

7 A. I did. I kept them all aware, both from the music side and
8 the publishing side.

9 Q. Now returning to the phonecalls which prompted that slight
10 digression, based on your years of negotiating with content
11 companies for content deals for your content stores, if you had
12 become aware, sir, in this instance that the publishers were in
13 frequent communication with one another, how if at all would
14 that have impacted your desire to continue negotiations?

15 A. Well I would have stopped the negotiations because I
16 wouldn't have been able to -- I would have felt like I wouldn't
17 have been able to get to an agreement that was good for Apple
18 and consumers.

19 Q. And why is that?

20 A. Well, typically what happens as I -- with my experience is
21 I have an idea of how we want to structure the deal and each of
22 the companies has slightly different ideas. And they're not
23 all the same. And some have a particular issue on one topic.
24 Some have an issue on another topic and not the same one as the
25 other.

D6D9USA4

Cue - cross

1 If they're talking to each other and sharing that
2 information, then sort of they will all stand up and, my belief
3 is they would all stand up and basically ask for all the same
4 terms that are not good for Apple and good for what I think are
5 consumers. So I think the deal wouldn't get done with them.

6 Q. And did that happen here, sir?

7 A. No, it did not.

8 Q. Now, Mr. -- counsel also showed you another exhibit which
9 is Plaintiffs' 867. Had you ever seen this exhibit before this
10 morning?

11 A. (No response).

12 Q. You can look at it on the screen if it's easier, Mr. Cue.

13 A. Thank you. No, I had not.

14 Q. Counsel said that, page ten of the rough transcript,
15 "Looking at this chart, is it fair to say that you've had a
16 fair number of phonecalls with the CEOs of those five
17 publishers during the six weeks between when Apple first
18 approached the publishers to discuss the possibility of
19 entering into agreement to sell eBooks and late January when
20 you signed the five publishers?"

21 And you said -- answered, "No, I had lots of
22 communications with them at very small intervals of time, in
23 particular at the end, but I did not have constant
24 communications with them throughout that period of time."

25 Do you recall that question and your answer?

D6D9USA4

Cue - cross

1 A. I do.

2 Q. First question is just to ask the obvious. Anything
3 unusual with talking on the telephone to potential contractual
4 partners as you're negotiating a deal?

5 A. No. I do that all the time.

6 Q. And when you're working in California and your contractual
7 counterparties or potential contractual counterparties are in
8 New York, how do you communicate with them?

9 A. By phone and e-mail.

10 Q. Thank you. Now let's actually look at the evidence, sir.
11 And I want to show you Plaintiffs' Exhibit 788.

12 MR. BUTERMAN: Objection, your Honor.

13 THE COURT: Sustained. Stricken.

14 Q. Now I want to direct your attention to the government's
15 exhibit, Plaintiffs' 788.

16 MR. SNYDER: And could we put side-by-side on the
17 screen, Andrew, a calendar which I have marked and we'll offer
18 in evidence as Defendant's Exhibit 718.

19 Would the Court mind, your Honor, if I use a light
20 bearing instrument to point to dates where appropriate?

21 THE COURT: Not at all.

22 MR. SNYDER: Thank you.

23 Now, if you can, Andrew, put the calendar, blank
24 calendar on the screen, side-by-side, with Plaintiffs' Exhibit
25 788.

D6D9USA4

Cue - cross

1 Q. Now am I correct, sir, that you had your initial meetings
2 on December 15 and 16, 2009 with the publishers?

3 A. Those were the first time I met them in person.

4 (Continued on next page)
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D6DPUSA5

Cue - cross

1 BY MR. SNYDER:

2 Q. And at those meetings, did Apple and any publisher reach
3 any agreement of any kind on any topic relating to the sale of
4 eBooks?

5 A. Those were discovery meetings. Those were the first times
6 I got to meet with them, and so I was there to learn. I wanted
7 to understand the book marketplace and what they wanted to see,
8 what was going well, what wasn't going well, the technical
9 requirements of running a bookstore, lots of information that I
10 was gathering at the time.

11 Q. Now, you testified that sometime between the 15th and 16th,
12 your initial meetings, and the 21st, where there are the phone
13 calls that counsel took you through with three publishers, you
14 made a determination to begin consideration of an agency model;
15 is that correct?

16 A. That's correct.

17 Q. Now, let's look at the call entries for 12-21, and do you
18 see there are several calls under two minutes with --
19 withdrawn.

20 Do you see that there are two calls, at least, placed
21 under two minutes involving Mr. Young, David Young, there and
22 there?

23 A. I do.

24 Q. One's 18 seconds and one is 23 seconds?

25 A. That's correct.

D6DPUSA5

Cue - cross

1 Q. Are you aware that there's no -- You've reviewed the
2 e-mails from Mr. Dohle, Ms. Reidy and Mr. Sargent summarizing
3 the phone calls they had with you on the 21st?

4 A. That's correct.

5 Q. Are you aware of Mr. Young having any e-mail summarizing an
6 18-second or 23-second call with you at 11:45 a.m. and then
7 11:46 a.m. on the 21st of December?

8 A. No, I didn't talk to him; so that wouldn't be the case.

9 Q. And on that topic, can we please go back to government's
10 857? Looking at this chart, sir, that counsel showed you, do
11 you have any way to determine whether -- I'm sorry. I meant to
12 do the one that was involving you. 867.

13 Do you have any way of knowing whether the 18-second
14 and 23-second telephonic communication from one number to
15 another listed on Plaintiff's 788 is captured in any of those
16 so-called spiderwebs that I'm pointing to between Apple and
17 Hachette?

18 MR. BUTERMAN: Objection.

19 THE COURT: Overruled.

20 Q. Sir?

21 A. No, I don't know what -- I don't know what is counted or
22 isn't counted there.

23 Q. Now, let's go back to 788. You had a
24 ten-minute-and-45-second call with Carolyn Reidy at 10:33 a.m.;
25 do you see that?

D6DPUSA5

Cue - cross

1 A. I do.

2 Q. You had a 17-minute-and-37 second call with Markus Dohle at
3 12:17 p.m., correct?

4 A. I do.

5 Q. Markus Dohle was the head of Random House, correct?

6 A. That's correct.

7 Q. Did Apple enter into an agency agreement with Random House?

8 A. We did not.

9 THE COURT: At that time?

10 Q. At any time?

11 THE WITNESS: Sorry. I apologize.

12 THE COURT: Yes. I assumed you meant at that time.

13 THE WITNESS: Sorry, your Honor.

14 MR. SNYDER: Yes.

15 THE COURT: Right?

16 Q. And not in January either, correct?

17 A. We tried very hard to enter into an agreement with Markus
18 Dohle throughout the process, but I was unable to get him to
19 sign an agreement.

20 Q. And then finally you had an 11-minute call at 12:48 p.m.
21 with Mr. John Sargent, correct?

22 A. That's correct.

23 Q. Sir, between the 15th and 16th of December -- and if we can
24 go to January, please -- and the 4th, 5th of January when you
25 sent out your initial proposals to the five, six publishers,

D6DPUSA5

Cue - cross

1 did you have a single telephone conversation, sir, with Penguin
2 on any topic, according to the government's phone records?

3 A. No, I did not.

4 Q. No meetings?

5 A. No, I did not.

6 Q. To your knowledge, did Steve Jobs have any communications
7 with anyone at Penguin during the period between the initial
8 introductory meetings in December and the time you sent out
9 your e-mail proposal?

10 A. He couldn't have because he would have asked me who to
11 call, and he never did.

12 Q. Any calls at all after the introductory meeting with
13 Mr. Young and his colleagues at Hachette between the time of
14 that initial meeting and when you sent Hachette your initial
15 e-mail proposal in early January?

16 A. Not that I can recall.

17 Q. Well, if you look at the phone records, 788, can you
18 confirm whether between December 22 and January 5, first of
19 all, whether there were any phone calls between any publisher
20 and you? And look at that chart.

21 A. Between the 23rd and the --

22 Q. 21st when you had --

23 A. Yes.

24 Q. -- the calls with the three publishers?

25 A. No, there's not.

D6DPUSA5

Cue - cross

1 Q. And now, I want to ask you about HarperCollins. We'll get
2 to HarperCollins later and your negotiation with HarperCollins,
3 and I believe you touched on it earlier; am I correct?

4 A. That's correct.

5 Q. And you were asked questions about Mr. Steve Jobs calling
6 Mr. James Murdoch, e-mailing Mr. James Murdoch to persuade
7 HarperCollins to do the deal?

8 A. That's correct.

9 Q. Do you know the date -- Andrew, calendar, please -- do you
10 know the date on which you met with HarperCollins, whether it
11 was the 15th or 16th? Can you recall? Within the first three
12 or the second three, I can't remember.

13 A. An e-mail would tell us, but I honestly don't remember.

14 Q. Between the 15th and the 16th of December and the 4th or
15 5th of January, when you sent out your initial e-mail proposal,
16 did you have a single telephone conversation with anyone at
17 HarperCollins?

18 A. No, I did not.

19 Q. In fact, sir, if you look at your calls with John Sargent
20 on Government Exhibit 788, after your initial call with
21 Mr. Sargent for 11 minutes at 12:48 p.m. on December 22nd, when
22 was the next call you had with Mr. John Sargent following your
23 January -- your December 21 call? If you can scroll down, and
24 take your time.

25 A. I believe it is on the 21st at 3:47 p.m.

D6DPUSA5

Cue - cross

1 Q. Which month?

2 A. January.

3 Q. What was January 21st? What did it signify in connection
4 with this negotiation?

5 A. Well, we were getting near the end, and I needed to get the
6 deals done, and so I was negotiating with the publishers here
7 basically on a 24-by-7 basis; so I was willing to call or see
8 or e-mail anybody at any time. So I had -- I felt tremendous
9 pressure to get deals done at this point because we were
10 getting near the iPad launch date.

11 Q. Why did you feel pressure, sir?

12 A. So I've worked at Apple for 24 years. I've worked for
13 Steve for 16, 17 years. I was very close to him. Steve was
14 near the end of his life when we were launching the iPad, and
15 he was really proud of it. He was working hard on it.

16 I believed that the bookstore was going -- and iBooks
17 was going to be a tremendous feature of the product. People
18 were going to love it, customers and our consumers were just
19 going to go wild about iPad and iBooks, and I wanted to be able
20 to get that done in time for that because it was really
21 important to him.

22 And so I felt that pressure tremendously now. I
23 normally would have felt it anyway. I like getting my work
24 done. I pride myself on being successful, but this had extra
25 meaning to me.

D6DPUSA5

Cue - cross

1 Q. And, sir, were you in New York on January 21st?

2 A. I was.

3 Q. And you said 24/7 -- Do you have an ability, based on your
4 present recollection, to actually accurately estimate how many
5 hours a day you were negotiating agency agreements with the
6 five publishers -- if we can get the calendar, please -- during
7 the week of 21st, 22nd, 23rd, 24, 25 and 26?

8 A. If I was awake, I was negotiating, other than talking to my
9 wife and kids at home.

10 Q. Did you stay in New York over that weekend?

11 A. I did.

12 Q. And if you look at the chart, Government's Exhibit 788, can
13 you tell the Court where the majority of the calls involving
14 you can be found on the so-called spiderweb involving you, on
15 the one hand, and the individual publishers, on the other?

16 A. The majority of the calls are during that week, from the
17 21st, all the way through the 26th.

18 Q. Now, let me take you to the next exhibit, which is
19 Plaintiff's Exhibit 870. Do you remember being shown this
20 document by counsel this morning?

21 A. Yes.

22 Q. And do you remember being asked this question and giving
23 this answer? Apple's entry rather than -- withdrawn.

24 Do you remember being asked whether the average price
25 of eBooks of the five major publishers went up and stayed

D6DPUSA5

Cue - cross

1 elevated? Do you remember a question to that effect?

2 A. Sorry, repeat --

3 Q. Do you remember being asked whether --

4 A. I was looking at this document, sorry.

5 Q. Do you remember being asked whether after Apple entered the
6 market, whether the price of eBooks of the five major
7 publishers went up and stayed elevated?

8 A. I do.

9 Q. And you testified "That's not the way I looked at it"?

10 A. That's correct.

11 Q. Why was that not the way you looked at it?

12 A. Well, so when we met those publishers, as I stated, they
13 weren't happy with Amazon. They were windowing books. So one
14 of the things that I was not willing to accept was not having
15 those books in the store.

16 And so when I look at it, we launched a product that
17 had books that were not going to be available on Amazon or any
18 other place that was windowed, No. 1. I expected them to price
19 some of the books at 12.99 or 14.99 based on that capability.
20 I didn't know how many they would price, but I certainly
21 expected them to price some, at least to start with.

22 I also had put some tiers in place to make sure that
23 other books were cheaper. I had put a maximum price tier of
24 9.99 for some other books, and trying to do that, in my
25 discussions with them, they let us know that one of the reasons

D6DPUSA5

Cue - cross

1 they wanted to have control of pricing is they wanted more
2 flexibility to take books that weren't selling well and lower
3 the price, and take books that were older and do different
4 things with pricing and moving the pricing from that
5 standpoint.

6 And so my view was, going into the market, I knew that
7 some books would definitely go up, but other books would be
8 available for the first time. And I expected them -- that
9 others, they would play around with the pricing and compete
10 with each other.

11 Q. Let me ask some follow-up questions. When you talk about
12 prices, prices on what bookstore are you discussing right now?

13 A. I'm talking about the Apple bookstore. That's all I could
14 focus on because it's the only thing I had control of. And I
15 only had control of it by my tiers that I set in place because
16 it's an agency model; so the publishers decided what the price
17 was. The tiers gave me a way to make sure that, at worse case,
18 those were the maximum price points that they would use.

19 Q. Now, you talk about the fact that Kindle was being windowed
20 by publishers for some new releases; is that correct?

21 A. That's correct.

22 Q. Was that the condition of the market as Apple found it when
23 it first, as we've been saying, came to town?

24 A. That is correct.

25 Q. And for the consumer, looking for an eBook on Kindle, based

D6DPUSA5

Cue - cross

1 on your understanding of the book business as you acquired it
2 during the negotiations, what's the impact on the consumer who
3 wants to buy an eBook, let's say the Palin or Kennedy book,
4 popular at that time, and finding it not available at all on
5 Amazon or NOOK?

6 A. Well, I mean, there are two options for the consumer. One,
7 they don't get to read it at all and, obviously, it's
8 disappointing because you can't get it; or, two, they have to
9 go buy it in a physical way, and the physical price is
10 generally higher than the physical -- than the digital price,
11 and so they would have to pay more.

12 Q. Has Apple, as a content distributor, either on the iTunes
13 store, the App Store or now the iBookstore, ever permitted
14 windowing of important new release content?

15 A. We don't permit windowing at all. We think it's a -- if
16 you're going to run a store, you cannot have content that's
17 windowed.

18 Q. Why not?

19 A. Because you're trying to get customers to come to your
20 store, and if they can't find it, they won't come back, they'll
21 go somewhere else and -- so number one. Number two, as I said,
22 they can't find it, we know that digital is a better price for
23 consumers; so at that point, we're telling consumers they have
24 to buy it somewhere else at a higher price. And so we've been
25 unwilling to do that.

D6DPUSA5

Cue - cross

1 Q. Now, you also talked about giving pricing over to the
2 content provider as part of agency. Do you remember that being
3 an element of your answer?

4 A. I do.

5 Q. And what year did Apple open up its App Store?

6 A. I don't recall, but I'm sure if you give me the date, I'll
7 remember. It's -- I believe it was in 2010, but I don't
8 recall.

9 Q. Were you intimately involved in its creation and launch?

10 A. I was.

11 Q. On what model does Apple sell apps?

12 A. On the agency model.

13 Q. And do you know approximately how many apps have been
14 downloaded since the App Store was developed?

15 A. Well over 50 billion.

16 Q. And how are those 50 billion apps priced on the App Store,
17 by whom?

18 A. They're priced by the developer of the app. We give them a
19 set of tiers in which to price the apps, and the developer, we
20 give them a system, just like we gave the publishers, where
21 they can come in and set the price points and modify the price
22 points at any time across the tiers of pricing that we have.

23 Q. Since the launch of the App Store -- withdrawn.

24 From the time of the launch of the App Store until the
25 launch of the iBookstore, did Apple have an opportunity, that

D6DPUSA5

Cue - cross

1 is you and your colleagues, to evaluate how the agency model
2 has worked for the App Store?

3 A. We did. It was the first time we had ever done an agency
4 model and so we knew how it worked at that point. We knew how
5 it operated. We knew how it worked for consumers, for us, for
6 the developers, and so we had a very good understanding of it.

7 Q. How did it work for consumers?

8 A. For consumers, it was -- they don't really see the
9 difference. They come in and see a price point that is set by
10 the developer, and so they buy it. And so from a consumer
11 point of view, it's worked effectively because developers
12 compete with each other, and so they set the price. And the
13 competitive nature of the developers keeps it -- keeps the
14 pricing, you know, aggressive across all of the developers.

15 Q. And how did it work for Apple?

16 A. For Apple, we collect the fees, we process the transaction,
17 and then we give the customer the actual application. We keep
18 30 percent, as an agency fee for running the service, and we
19 give 70 percent of it to the developers.

20 Q. Is that a -- that 30 percent, is that a gross or net number
21 to Apple?

22 A. It's a gross number.

23 Q. Now, how, if at all, did Apple's experience with the App
24 Store influence the decision by Apple to pursue an agency model
25 in December 2009 for books?

D6DPUSA5

Cue - cross

1 A. Well, as we kind of -- as I mentioned, when I went to
2 New York, it was a learning experience. Right? I spent
3 several hours, hour to two hours, with each of the publishers,
4 got a lot of information and kind of thought a lot about it and
5 came to the conclusion two of the publishers had told us that
6 they wanted to go to an agency model.

7 My first reaction when I had gone there, we wanted to
8 do a wholesale deal, and so I wasn't really receptive to it.
9 But as I got back, I realized sort of the constraints and
10 issues that the publishers were trying to do, which is price
11 books at sort of \$15, holdback, windows. I didn't believe that
12 I could get a wholesale deal, and I thought, wow, you know,
13 we've done this with an agency model where we let the
14 developers set the price. It's worked very effectively for us.
15 Could we do this for books?

16 And so I said, yeah, that's a great idea, but I
17 thought more about it. One of the issues that came about was
18 how do I know for sure that if I let them price completely for
19 free at any price points that they want, what would they do?
20 And I had just met these individuals. I didn't know them very
21 well. And so I said, you know, I really want to set some caps
22 here and tiers so that they don't go above them. And we had
23 done the same thing in the App Store. We had set a price tier
24 of \$999 at the App Store as the maximum price; so I set the
25 same thing for books.

D6DPUSA5

Cue - cross

1 Q. 999?

2 A. For the App Store.

3 Q. What sells for 999 at the App Stores?

4 A. They're enterprise apps. Obviously, not consumer apps.

5 Q. Now, you said that with respect to the wholesale model,
6 there were constraints and issues, and you refer to a wholesale
7 price and the ongoing windowing; is that correct?

8 A. That's correct.

9 Q. Can you explain to the Court, sir, why having gone into
10 New York in a wholesale state of mind, you came out thinking
11 that wholesale was not going to work for Apple?

12 MR. BUTERMAN: Objection.

13 THE COURT: Overruled.

14 A. Yes. As I sat down, one of the things that I asked them
15 certainly is, in a wholesale model, one of the questions that
16 you have is, what are you selling the books at to us? And so
17 as I asked them, they stated the fact that they were selling --
18 and I focused a lot on new release hardbacks, to start with.
19 To ask that question, I asked about others, but focused on new
20 release hardbacks.

21 Q. Let me stop you there. A, why did you ask about new
22 release hardbacks; and, B, how did you know enough about the
23 book industry to ask that?

24 A. Well, I had already read the news reports that they were
25 holding back new release hardbacks. I knew what a new release

D6DPUSA5

Cue - cross

1 hardback was because I was a book reader, and so I bought new
2 releases, certainly.

3 And in my conversations, my initial conversations with
4 the three publishers that I had earlier, they had, you know,
5 said that they were unhappy with 9.99 as a price point. I knew
6 that was a contentious issue going in; so I really wanted to
7 understand, well, what was the contention.

8 One of the first questions you ask is, what are you
9 selling those books to me at? And their price points were that
10 they were selling those books at anywhere from 12 to \$14 or
11 anything to that ballpark, typically, and that as a matter of
12 fact, they were going to be raising those prices. And they had
13 just raised them once and they were going to raise them again.

14 And then, secondarily, is that they wanted -- they
15 were going to have the ability of saying which books they would
16 make available at the time that the book came out physically.
17 And so they wanted to be able to -- the windowing, holdback
18 language that we've all talked about today, which is they
19 wanted the ability the decide on a book-by-book basis which
20 ones they would give us, when they would give it to us, and at
21 what prices they would give it to us.

22 Q. Did you have a conversation with Steve Jobs --

23 MR. SNYDER: If I could have the calendar, please,
24 Andrew.

25 Q. When you got back to New York, I think you told counsel

D6DPUSA5

Cue - cross

1 that you were back in New York by the 17th or 18th; is that
2 correct?

3 A. I believe I flew back right after the meeting; so I was
4 probably back that night and in the office on the 17th.

5 Q. And do you recall the e-mails you saw from the 22nd from
6 Markus Dohle and others recounting of the conversations you had
7 on the 21st?

8 A. I do.

9 Q. And do you believe that the conversations you had with
10 Steve Jobs about how to proceed occurred sometime between the
11 17th of December and the 21st of December?

12 A. They started on the way to the airport because I was trying
13 to get him up to speed as quickly as I was getting up to speed.
14 As I said, neither of us was very knowledgeable about the book
15 market, and so I immediately started relaying and kind of
16 talking about what I saw as the issues of getting a deal done,
17 that was, with them.

18 Q. And do you recall having a conversation with Mr. Jobs
19 during this time period in which you discussed whether you
20 should pursue agency agreements?

21 A. I did. We -- As I thought about this and looked at this, I
22 thought that an agency model would address the issues that we
23 had, which is to have a competitive bookstore with all of the
24 releases available at the time that they're new, and that even
25 though the price of some books would be going up from 9.99 to

D6DPUSA5

Cue - cross

1 12.99, I would put -- I had come up with the idea of putting
2 caps to make sure they could only go up that high. I would
3 require those books that were held back to come into the
4 market.

5 Q. Let me interrupt you because I'm not asking about what your
6 state of mind was then, but whether you recall speaking to
7 Steve Jobs on the subject?

8 A. Oh, I did. You know, once I had sort of formulated a game
9 plan of what I thought would be a set of terms, then I went to
10 Steve and kind of expressed, here's what I'm thinking. And,
11 you know, I don't recall exactly all of the points and who
12 came, but we trade back and forth ideas and came to a
13 conclusion of, yes, this is a good idea.

14 Q. Let me just pause, hit the pause button there, and ask you
15 approximately how many content deals have you negotiated for
16 Apple during your career?

17 A. That are signed? It's got to be in the many tens of
18 thousands.

19 Q. And have you worked -- Was Steve Jobs your boss for most of
20 that time?

21 A. He was my boss for all of the time.

22 Q. And can you tell the Court how you worked with Steve Jobs
23 as a negotiator on content deals? What was the -- was there --
24 Let me ask you first.

25 Was there a pattern and practice about how involved he

D6DPUSA5

Cue - cross

1 was, what role he played when you were the lead negotiator on
2 the ground?

3 A. Yeah, it's been pretty much the same on all of the deals
4 that I've ever done. I, as the lead negotiator, you know, I
5 consider sort of as the person charged by Steve, I knew what we
6 needed from a bookstore perspective. I had a lot of experience
7 before and certainly in all the deals; so him and I would talk
8 about it before we would launch.

9 Before I would go out and negotiate, we'd sit down and
10 kind of talk, do we want to enter this market? Right? Do we
11 want to go into the music business? If we were going to do it,
12 how would we do it? We do a little brainstorming together, and
13 then I go off and say, okay, I'm going to go educate myself by
14 talking to all of the key players, whether it's the music
15 labels, the publishers, the movie companies. So I start
16 understanding what the market is like.

17 So I start shaping what I think the deals and
18 negotiations that can happen, and then I run them by Steve.
19 And so I run those by Steve and say, here's what I think. I
20 think this is the way we should do this and here. And
21 sometimes, you know, he'll say that's fine, that's great, or
22 sometimes he'll say, I don't like this, or have you thought of
23 this? And I do that only in the times that they're material.

24 So I spend the majority of my time doing these
25 negotiations back and forth, and I know what Apple needs from

D6DPUSA5

Cue - cross

1 these deals and what Steve wants from those deals. So I don't
2 communicate with him on a point-by-point in a contract or term
3 sheets that we send out. I do it at a high level. I know what
4 we want, and then when something isn't going the right way or I
5 think I need to change something, then I'll bring it up with
6 him.

7 Q. What role, if any, did Steve Jobs play in actual
8 negotiations during the course of your career negotiating
9 deals, that is, when you would involve him at any time in the
10 actual negotiations?

11 MR. BUTERMAN: Objection.

12 THE COURT: Sustained, but you can bring it back to
13 books.

14 MR. SNYDER: Getting tired; so I'm leading. I'm
15 sorry.

16 THE COURT: But, no, leading isn't the problem.

17 MR. SNYDER: Foundation?

18 THE COURT: Let's bring it back to books.

19 Q. Okay. Bringing it back to books, was the question of
20 whether to pursue an agency model a high-level enough issue
21 that, in your pattern and practice, that you would raise that
22 with Steve Jobs?

23 A. Absolutely.

24 Q. And at that time, what were Apple's options with respect to
25 eBooks? Let me ask it this way. Withdrawn.

D6DPUSA5

Cue - cross

1 Had Apple made a determination by the 21st of December
2 as to whether it would enter -- attempt to enter into wholesale
3 agreements with the book companies?

4 A. By the --

5 Q. 21st of December?

6 A. By the 21st of December we had already decided that we
7 wanted to go to an agency model.

8 Q. And was Apple prepared to enter into a wholesale deal with
9 the publishers as of December 21st, paying 15 or \$16 a book in
10 the current market conditions?

11 A. No. I thought that was crazy, and so it's not a real
12 viable option.

13 Q. I have to ask this question just for the record, sir.
14 Apple is a rich and powerful company. Why did it enter the
15 eBook business, losing money on new releases, if it wanted to
16 open up a bookstore and that was the price of entry on a
17 wholesale model?

18 MR. BUTERMAN: Objection.

19 THE COURT: Sustained.

20 Q. Is Apple a wealthy company?

21 A. I think by most people's definition.

22 Q. Right. And it was in 2009, correct?

23 A. Yes, it was.

24 Q. All right. Why wasn't Apple prepared to lose money on a
25 wholesale model in order to enter the eBook business?

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Cue - cross

1 A. Well, we're not willing to lose money under any model, and
2 the reason is, if you're starting a new business, like eBooks,
3 and we're losing money, am I really going to put my best people
4 on it? Am I going to market it? Am I going to invest in it?
5 Am I going to try to move it forward in a business that doesn't
6 make any money and that's losing money?

7 History, for me, as a person who's run a lot of
8 businesses, shows me that people that do businesses that lose
9 money quickly, give them up over time or change them to make
10 money.

11 Q. Let me ask you this question, sir, if Apple is not prepared
12 to enter on a wholesale model and did not enter on an agency
13 model, what was its third option, if any?

14 A. Well, we had an option of not entering the market at all,
15 which I guess is an option, but not one that I really wanted.

16 Q. Are you aware that the government in this case has
17 contended that instead of entering on an agency agreement, if
18 Apple didn't want to enter on a wholesale model, it should not
19 have entered at all and left it up to Amazon and Barnes and
20 Noble to compete?

21 MR. BUTERMAN: Objection.

22 THE COURT: Sustained. Shall we take our
23 mid-afternoon break at this time, Mr. Snyder, or did you want
24 to go a bit further?

25 MR. SNYDER: I mean, I hate to take a break on a

D6DPUSA5

Cue - cross

1 sustained objection, but, yes, your Honor.

2 (Recess)

3 BY MR. SNYDER:

4 Q. Mr. Cue, I want to direct your attention, please, to
5 Plaintiff's Exhibit 842. Do you recall being shown this, these
6 squiggly lines?

7 A. I do.

8 Q. And have you seen these squiggly lines before this morning?

9 A. I had not.

10 Q. Now, do you remember being asked whether you were surprised
11 that as of April 1st, prices of New York Times best sellers and
12 new releases for the publishers who had signed agency deals,
13 went up on the Apple bookstore?

14 A. I do.

15 Q. And do you remember saying you were not surprised?

16 A. That's correct.

17 Q. Let me ask you this question, sir. Was it Apple's intent
18 in providing price tiers for 99 cents to 12.99 or 14.99, that
19 the publishers would price all their New York Times best
20 sellers and new releases at the top of the tier?

21 MR. BUTERMAN: Objection.

22 THE COURT: Overruled.

23 A. No, I was not.

24 Q. Can you describe to the Court, please, what your thinking
25 was -- withdrawn.

D6DPUSA5

Cue - cross

1 Who came up with the idea of the price tiers?

2 A. I did.

3 Q. Who came up with the idea of the price caps?

4 A. I did.

5 Q. What was your thinking behind the price caps and the price
6 tiers as you were putting together the materials for an agency
7 deal?

8 A. In an agency deal, the publisher would get to set the price
9 at whatever they wanted. My concern was if there were no sort
10 of tiers, what prevented publishers from setting price points
11 that were equal to or as very high compared to the physical
12 book?

13 I had heard some of that from HarperCollins, as an
14 example, and so I wanted to make sure that the book pricing was
15 going to be competitive, and I felt if I gave a price -- if I
16 gave them tiers and caps, I would force them, at least at a
17 maximum price point, to live within those. And then, as they
18 competed with each other and they established different books,
19 I wanted them to have the flexibility, obviously, to change
20 pricing.

21 Now, we like magic price points at Apple. If you are
22 familiar with our music stores and our App Stores, in general,
23 we end things in 99 cents. And so I had suggested that we
24 price those tiers from 99 cents all the way to 12.99 or 14.99,
25 depending on which type of book.

D6DPUSA5

Cue - cross

1 Q. And did Apple have any -- withdrawn.

2 Do you remember questions being asked of you about
3 whether Apple cared about the consumer?

4 A. I do.

5 Q. Did Apple have any preferred price for new releases and
6 New York Times best sellers within the tier of 99 cents to
7 12.99 or 14.99?

8 A. We didn't have a preferred price. We were -- you know,
9 we've sold things all the way from 99 cents on; so we didn't
10 care at what price the publishers priced it at. We were
11 even -- I think we even expressed to them and the publishers,
12 when I was there, that, you know, 9.99 might be the right price
13 for some of the best New York Times best sellers. But we
14 didn't really know the market that well to be able to tell what
15 the right price points were.

16 Q. Now, there was a question about your 30 percent commission
17 in connection with the price caps; do you remember that
18 question?

19 A. I do.

20 Q. And do you remember a suggestion being made that, through
21 the question, that Apple intended to -- withdrawn.

22 Do you remember a suggestion, through a question, that
23 Apple raised the price cap deal term from 12.99 to 14.99 so
24 that it would get a bigger commission?

25 MR. BUTERMAN: Objection.

D6DPUSA5

Cue - cross

1 THE COURT: Sustained.

2 Q. Do you recall being asked whether your agreement to raise
3 the cap from 12.99 to 14.99 for certain books was an exchange
4 for you keeping your 30 percent commission?

5 A. I do.

6 Q. And you said no, correct?

7 A. That's correct.

8 Q. Why did you say no?

9 A. Well, so when I was -- as I said, we're learning about
10 books. So as I learned about books, I went into the
11 marketplace thinking, like, most hardback new releases sort of
12 retail for \$25 or \$30. In talking to the publishers, I learned
13 that they had a lot of different pricing, physical book
14 pricings for books; so books could be \$26.99, 27.99 and even
15 28.64, for that matter, and \$31.

16 And so they had expressed, as I had come up with my
17 price tiers, I had not really taken that into account and that
18 some of the books that they had at those different price points
19 kind of didn't make sense with my tiers. And so that's why I
20 went back and I realized that they were right.

21 Yeah, they wanted a little more in those pricings, but
22 it made sense to me as to why they wanted it because those
23 prices of books were different. So I expanded the tiers to
24 allow for that.

25 Q. Now, in terms of Apple's 30 percent commission, what drives

D6DPUSA5

Cue - cross

1 Apple's profits at 30 percent, the price or volume?

2 A. Oh, volume.

3 Q. And what has been Apple's experience selling content at
4 9.99, 6.99, 1.99 or 99 with a 30 percent profit?

5 A. With a 30 percent margin.

6 Q. Margin.

7 A. I wish it was profit, but it's not. We make in the high
8 single-digit profitability from running those services at those
9 price points, and so as I said, we make it up in volume. When
10 we sell a 99-cent song or we sell a 9.99 album, it's effective
11 for us because we sell a lot of songs.

12 Q. Let me show you Defendant's Exhibit 714. Oh, no, that's
13 the wrong -- yes. And counsel pointed you to paragraph 3 of
14 your direct testimony, where you said after the initial
15 meetings in New York, I don't know which paragraph it was,
16 nothing scared me or made me feel we can't get these deals
17 right away. Was that in the declaration, I believe?

18 A. That's correct.

19 Q. And you said that that was correct, and can you explain
20 why?

21 A. Yes.

22 Q. Having concluded that the wholesale model was not workable?

23 A. I mean, in my experience, I've never walked into a
24 negotiation or my initial meeting and walked out with an
25 agreement, and so I didn't expect to go to New York and spend

D6DPUSA5

Cue - cross

1 two days there and come back with agreements. That's not
2 reasonable or feasible, and so there was nothing in there that
3 I learned at the time that scared me.

4 I wasn't sure what the agreement was going to be at
5 that time, but I didn't walk into a meeting where they said,
6 you know, thanks for coming, but we're not interested in doing
7 business with you, or thanks for coming, you know, we have --
8 come back in a few months, we don't see what your offering.

9 You know, they were excited to see Apple because they
10 thought that we could do something compelling, I felt, and so
11 they were excited to see a new entrant into the marketplace.
12 Though, I didn't show them the device, I communicated to them
13 that our device was going to be something that no eBook reader
14 had ever seen before by having things like color, having things
15 like touch. And so I felt that we could do books that had
16 never been done before.

17 And so, in general, as I talked to them, yeah, there
18 were some significant issues there, but I was confident in my
19 abilities that, over time, I would be able to negotiate a deal
20 with them.

21 Q. Had you used a demo of the iPad at that time?

22 A. I had.

23 Q. Had the iBookstore been built by December 15th?

24 A. It had not. We were -- we didn't start at that time. We
25 were, you --

D6DPUSA5

Cue - cross

1 Q. And so -- I'm sorry.

2 A. Sorry. We hadn't had it completed at that time.

3 Q. So how on the 15th of December and 16th of December, in
4 your initial meetings, did you know that e-reading software
5 that was not yet created would be, I forgot what you used,
6 would be --

7 A. Superior to, it would be better than anything in the
8 marketplace.

9 Q. How did you know that at the time?

10 A. Well, so I was -- the engineering team that was going to
11 build it worked for me. I had used an iPad for the first time
12 and -- awhile back and had used one thereafter, and I knew a
13 lot about the touch interface that it had, the screen
14 resolution, the fact that it was color, that it could play back
15 video.

16 And so as I had talked to my engineering team, we had
17 a lot of thoughts already about the type of eBook reader and
18 eBook store that we would build, and so I was pretty excited
19 about it. I thought we could build something that was
20 spectacular, that consumers were going to go, that's the best
21 eBook store and eBook reader that they've ever seen.

22 Q. Do you know when your engineers began working on, for
23 example, the foot page and other interactive functionality of
24 the e-reading software that became the iBook software?

25 A. It was in December. Again, some of the functionality we

D6DPUSA5

Cue - cross

1 were able to leverage off of other applications, but like sort
2 of the page flip that we did was an idea that we came up with
3 as we were developing. And we thought it was a great way for a
4 customer, even though they were holding a physical device, to
5 kind of get the experience of a physical book.

6 Q. When you began your investigations in late November and
7 December of 2009, was Steve Jobs immediately on board with the
8 idea of pursuing a bookstore?

9 A. No, he wasn't interested.

10 Q. And could you tell the Court, did he become interested at
11 some point?

12 A. Yes. What happened was, even before the iPad, I had
13 thought when we did the iPhone, that given the experience and
14 knowledge that we had running stores, that we should go build a
15 bookstore. And so prior to even the iPad, I had talked to
16 Steve about that.

17 Steve never felt that the Mac, at the time, or the
18 iPhone were ideal reading devices. In the case of the phone,
19 the screen was smaller, and in the case of the Mac, you had
20 this keyboard and device, and it didn't feel like a book. And
21 so, you know, that had kind of got away.

22 What happened was when I got my first chance to touch
23 the iPad and was using it as it was being developed, I became
24 completely convinced that this was a huge opportunity for us to
25 build the best e-reader that the market had ever seen. And so

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Cue - cross

1 I went to Steve, and we had a meeting about it, and I kind
2 of -- I believe I even sent him an e-mail kind of dictating all
3 of the principles of why I thought it was going to be a great
4 device.

5 And him and I sat together and talked about it, and
6 after some discussions back and forth and some thoughts on him,
7 he came back and said, you know, I think you're right. I think
8 this is great, and then he started coming up with ideas himself
9 about what he wanted to do with it and how it could be even
10 better as a reader and store. And so that led us to say, okay,
11 go ahead and see if you can get the deals.

12 Now, that was the good part. The bad part was that
13 this was in November, and as you all are aware of, we were
14 launching the product in January. And so Steve said, you know,
15 it's fine, you can go do this, but you've got to get it done by
16 January. So you have to get the deals done, and I want to be
17 able to demo it on stage. And so that was the sort of
18 challenge presented to me.

19 Q. And if you had not done sufficient number of deals to
20 populate a bookstore with a sufficient amount of digital
21 content, would the iPad have launched without a bookstore?

22 A. Yeah, we would have launched it without a bookstore.

23 Q. Let me show you Plaintiff's Exhibit 36, which are notes
24 that you were shown written by Mr. Moerer and Mr. Saul from the
25 December 15 and 16 meeting, and I'll direct your attention to a

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Cue - cross

1 paragraph that you were asked to look at.

2 Page 3, under HarperCollins, and there's a reference,
3 sir, to interested in agency model to fix Amazon pricing, we
4 said no. Do you recall being asked about that question?

5 A. I do.

6 Q. Do you recall being asked to clarify -- do you recall --
7 withdrawn.

8 Do you recall asking counsel, would you like me to
9 clarify, after you gave a yes or no answer to that question?

10 A. I did.

11 Q. Can you please clarify now why you were not interested in
12 an agency model, according to your testimony, to fix the
13 publishers' Amazon problem industry-wide?

14 A. Well, at this time, when they presented the idea of an
15 agency model, their idea was to fix Amazon pricing, which
16 again, when I use the word "Amazon pricing" here, it's the 9.99
17 price for these books that were being sold at 12 to \$15, was to
18 fix it with us.

19 And so they were interested in moving us to an agency
20 model so that they were able to then price the books at
21 whatever price they wanted, and at that point, I wasn't even
22 thinking agency model. I was thinking wholesale, and so I said
23 no to them, and kind of moved on. As I said, this wasn't a
24 negotiation by any means. This was them presenting their ideas
25 to us.

D6DPUSA5

Cue - cross

1 Q. Were you aware in these introductory meetings on
2 December 15th and 16th, that the publishers had, from time to
3 time, that is the senior executives of the publishers, had
4 private dinners in different restaurants and locations?

5 A. No, I am -- I was not aware of that.

6 Q. Before November of 2009, were you aware of the names of the
7 CEOs of the major book publishers?

8 A. No, I was -- I didn't know them.

9 Q. And you were asked questions -- if you can look at the
10 calendar, Andrew -- about, apparently, you flew home and then
11 you flew back to New York, was that your testimony, for a
12 vacation?

13 A. That's correct.

14 Q. And were you with your family?

15 A. I believe I was with my wife.

16 Q. Now, counsel asked a couple of questions about within 48
17 hours after HarperCollins said they were interested in the
18 agency model, you reached out to certain publishers; do you
19 recall that question?

20 A. That's correct.

21 Q. Do you recall questions about you were doing this on your
22 vacation?

23 A. Yes.

24 Q. Why, when you were in New York to spend a weekend with your
25 wife, were you calling publishers and trying to meet with

D6DPUSA5

Cue - cross

1 publishers during what was probably the beginning of the
2 holiday vacation?

3 A. Again, I had planned to go to New York as a vacation prior
4 to ever -- before even knowing that I was doing anything with
5 books, and so I came to New York, and having had the meetings
6 with them and given the time frame that I had to get things
7 done by January, I felt like there was no time to lose.

8 And so I wanted to initiate conversations as quickly
9 as possible. Unfortunately, they didn't want to meet on
10 weekends at this particular time, and so I wasn't able to do
11 that while I was here, and so I was not able to meet with them
12 in person.

13 Q. Am I correct that you didn't -- did you even attempt to
14 meet with Penguin or HarperCollins during the holiday season?

15 A. I did not.

16 Q. Now, counsel asked you a number of times whether in these
17 phone conversations you discussed fixing Amazon's pricing, and
18 you answered several times, with "us," using that pronoun us.
19 Do you remember that?

20 MR. BUTERMAN: Objection.

21 THE COURT: Overruled.

22 A. I do.

23 Q. What did you mean by "us"?

24 A. Well, again, they didn't want us to have the ability -- us,
25 meaning Apple -- in the agreement to be able to price books

D6DPUSA5

Cue - cross

1 that they were selling to us at 12 to \$15 at 9.99, and so they
2 were concerned and wanted to make sure that the deal that they
3 struck with us didn't give us those abilities.

4 (Continued on next page)

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Cue - cross

1 Q. Let me take you now, please, to Plaintiffs' Exhibit 336,
2 which is a e-mail from Markus Dohle, I think you and counsel
3 agreed, summarized your December 21 call with Mr. Dohle which
4 you had on the 21st at 12:17 p.m. for 17 minutes and 37
5 seconds.

6 Do you remember looking at this e-mail?

7 A. I do.

8 Q. And there was a question about whether what Mr. Dohle was
9 writing was correct or incorrect.

10 Do you remember that?

11 A. I do.

12 Q. And there were a lot of negative -- double negatives. I
13 think your answer was no, it's not incorrect. And do you
14 recall that back and forth?

15 A. I do.

16 Q. Can you -- let me direct your attention to the part of the
17 e-mail where it says he also thinks that book prices are
18 becoming too low. He is worried about the consumer perception.
19 Do you remember being asked about that attribution to you?

20 A. I do.

21 Q. And did you tell Mr. Dohle -- do you recall, whether you
22 told Mr. Dohle during your 17-minute conversation that or in
23 substance what is highlighted?

24 A. No. I would never have said "the price is too low."

25 I would have told him that -- him, and like I told the

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Cue - cross

1 other publishers, that I was certainly willing to consider
2 prices that were higher than 9.99 for certain types of books.

3 In addition to that, I told him that I was certainly
4 concerned about what those price points would be.

5 So I certainly was looking at it from the consumer
6 point of view of what price points we may come up with.

7 Q. Did Apple have any interest in December of 2009 or January
8 of 2010 in preserving the ability of the major book publishers
9 to sell hardcover books at a high price?

10 A. No. Why -- there is no reason why we would ever want to do
11 that. Why would we want that? We're happy, as I said, selling
12 things from 99 cents all the way on up. The model works for
13 us. We have a lot -- we've sold billions of dollars that way.

14 Q. How does Apple at all compare to Barnes & Noble as a book
15 retailer in terms of the inventory, book inventory that's
16 offered?

17 A. At this time?

18 Q. Yes.

19 A. In general it's fairly comparable as far as all the major
20 publishers and independents from that standpoint, as far as
21 content is concerned.

22 Q. Does Apple sell physical books on its bookstore?

23 A. We do not.

24 Q. Does Barnes & Noble sell physical books on its bookstore?

25 A. We do -- sorry. They -- Barnes & Noble does not sell

D6d9usa6

Cue - cross

1 physical books and -- sorry. Barnes & Noble sells physical
2 books. We do not.

3 Q. Right. And does Amazon sell physical books as well?

4 A. They do.

5 Q. And in the past let's say in music by creating a
6 comprehensive music store, what impact, if any, has that
7 actually had on the physical side of the recorded music
8 business?

9 MR. BUTERMAN: Objection.

10 THE COURT: Sustained.

11 Q. All right. Let's go to the next exhibit which is 336.
12 We're on that. Sorry. That's the one we're on.

13 I want to point your attention to the last part of the
14 e-mail that counsel focused on which is, he answered that
15 windowing could be used -- last sentence -- "to establish a
16 distributor model on print pub date for eBooks (coming back to
17 simultaneous publication)."

18 Do you see that?

19 A. I do.

20 Q. Did you tell Mr. Dohle that or in substance that?

21 A. Well what happened in the conversation was -- Mr. Dohle
22 told me -- when I told him that I was interested in moving to
23 agency, he said he was interested in having a parallel path; in
24 other words, he wanted to be able to have wholesale deals and
25 agency deals with everybody at, you know, his discretion and

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Cue - cross

1 that standpoint.

2 What I said was, well that presents a problem for us
3 because if you're in an agency deal with me and you get to set
4 the price points and the other competitor or anybody else is
5 not in an agency deal, and they get to set the price points,
6 then how will I compete?

7 And so when he -- we were talking about that, I said
8 to him: What the other publishers have done is they've been
9 holding back books in order to do that.

10 And so that's what I was expressing to him, which is
11 it looked to me like the industry was using that as a way to
12 make sure that books, that they didn't want to sell at that
13 time, they were holding back. And I told Mr. Dohle that.

14 Q. Was that something that was reported in the national media
15 at the time?

16 A. It was reported in the national media and all of the
17 publishers -- four of the six publishers, to be exact, had told
18 me that.

19 Q. Counsel asked you whether you were giving advice to
20 Mr. Dohle there to threaten windowing. Do you recall that
21 question?

22 A. I do.

23 Q. And did you ever advise any publisher that they should use
24 the threat of windowing to change their business relationships
25 with any other e-retailer?

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Cue - cross

1 A. No.

2 Q. Counsel also asked a question "during your meeting with
3 Mr. Dohle," that was embedded in the question. Do you recall
4 that?

5 A. Yes.

6 Q. Did you actually meet in person with Mr. Dohle?

7 A. I did not. It was a phonecall.

8 Q. Counsel asked you whether you were surprised that on
9 January 28, 2010 Macmillan went to Amazon and used windowing as
10 a negotiating position in its discussions with Amazon. And you
11 said, "It did not surprise me."

12 Do you recall that?

13 A. I do.

14 Q. Why did it not surprise you that Macmillan would go to
15 Amazon after signing an agency agreement with Apple and
16 negotiate in that fashion?

17 A. Several reasons. One, as we've discussed, the press
18 reports were out there that the publishers were holding back
19 books.

20 Two, Macmillan, when we had talked about different
21 models, had said if we wanted to do a wholesale deal they
22 wanted the ability to holdback books. And so it certainly
23 didn't surprise me. It sort of -- it's been happening for
24 months in the marketplace. And so I didn't see that as
25 anything, you know, as a brand new idea or in any way something

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Cue - cross

1 new.

2 Q. Now, let's go to Plaintiffs' Exhibit 540.

3 Number four is the last bullet. And I think you and
4 counsel established that this was a reflection of your
5 conversation with Ms. Reidy concerning your idea of all
6 resellers being on agency, correct?

7 A. That's correct.

8 Q. Can you tell the Court, first -- look at the calendar,
9 Andrew -- when you believe you came up with the idea -- first,
10 who came up with the idea of in order to remain competitive and
11 on agency model, all resellers being on the same model?

12 A. I don't recall. I think it's a combination between Steve
13 and myself and even my own team that had met with the team. As
14 I was going back and looking at the data and decided that an
15 agency model is a good idea, one of my concerns in a model
16 where they get to set the price is how do I remain competitive.

17 And so between the 17th when I got back and that
18 weekend of the 20th where we sort of -- I sort of formulated
19 kind of the key deal points of how I could structure this, I
20 decided an agency model is a good idea. One of the issues that
21 came about is well how do I stay competitive. And my first
22 reaction was: Well the publishers are really interested in an
23 agency model, then let's ask them to move everyone to an agency
24 model as part of my deal, to make sure that I'm getting as good
25 a deal as anybody else is going to get.

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Cue - cross

1 Q. And did you discuss that concept with Mr. Jobs?

2 A. I did.

3 Q. Did you discuss that concept on the 21st with
4 Mr. Sargent, Ms. Reidy, and Mr. Dohle?

5 A. Yes. I presented it to all three.

6 Q. And counsel asked you a question in connection with this
7 idea that throughout negotiations with the publishers you were
8 asked: You constantly pitched the deal to them as a way to
9 change the entire industry.

10 Do you remember that question?

11 A. I do.

12 Q. Your answer was not true.

13 Do you recall that?

14 A. I do.

15 Q. Why was it not true that you pitched the publishers that
16 your agency deal was a way to change the entire industry?

17 A. I was -- my focus is thinking about this from an Apple
18 point of view. I'm not interested in their business or how
19 they do business with the -- with anybody else. So I'm looking
20 at this from an Apple point of view I'm going to go into this
21 marketplace. I'm negotiating deals with them for the first
22 time. And so I'm thinking about what are all the parameters
23 that I need in order to enter this market and provide the
24 products in the way that we want all of them available,
25 competitive pricing, etc. So that's my thought pattern and

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Cue - cross

1 what I'm thinking about.

2 Q. And in thinking about that thought pattern am I correct
3 that at some point you codified that in an e-mail proposal?

4 A. Yes. On -- I believe it was January 4, I sent an e-mail
5 proposal to the publishers.

6 Q. Was that the first day back from the holiday break?

7 A. It was.

8 Q. Let's look at Plaintiffs' Exhibit 521.

9 Let's withdraw that for a moment and look at
10 Plaintiffs' Exhibit 21.

11 Is this a copy of the e-mail proposal that you sent to
12 each publisher during the first few days after the holiday
13 break in January?

14 A. It is with the exception of sort of some -- at the top of
15 the header I personalized it.

16 Q. And attention was focused during cross-examination on the
17 all resellers of new titles need to be in the agency model. Do
18 you recall that?

19 A. I do.

20 Q. Was that the idea that you describe that you came up with
21 in the end of January?

22 A. Sorry. End of December.

23 Q. End of December?

24 A. I came up with the idea by -- in the weekend of
25 December 17, 18, and 19, yes.

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Cue - cross

1 Q. And I think you testified that there came a time when you
2 realized that that idea didn't work?

3 A. There was. We were -- our initial thought on this was,
4 again, they move everyone to agency, then we have competitive
5 prices and the deal that we have is the same as with others.

6 But as we started thinking about this, I started
7 thinking of several issues that were very concerning to me.
8 Number one, how was I to be assured that the agency deal that I
9 got was the same agency deal that they were going to give
10 somebody else? In other words, there was nothing in my agency
11 deal that said all the terms had to be the same and so it had
12 to be exactly the same as ours. And so they could turn around
13 and do an agency deal with somebody else that gave that other
14 party better terms.

15 THE COURT: Excuse me, Mr. Cue. I don't want to
16 interrupt but I am interrupting because I was distracted.

17 THE WITNESS: Yes.

18 THE COURT: Give me a second to catch up with you
19 here.

20 THE WITNESS: No problem, your Honor. Thank you.

21 THE COURT: Thank you.

22 MR. SNYDER: May I proceed, your Honor?

23 THE COURT: Yes.

24 THE WITNESS: As I was stating. So, first of all I
25 was concerned about whether we would be getting the same terms

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Cue - cross

1 and our agreement, as I was proposing it, didn't do that.

2 Secondly, I was concerned that even if they gave us
3 the same terms in the agreement, Amazon and Barnes & Noble were
4 extremely powerful, huge resellers of books, because they were
5 in the physical business along with digital. And so my concern
6 was what power did they have over the publishers to negotiate
7 deals that were combined between physical books and digital
8 books. So that's a second issue now. So maybe I'm getting the
9 same terms on the digital side but the way that they get around
10 by doing that is to give sort of my competitors better deals on
11 the physical side. And I'm thinking okay, well I don't know
12 how to address that because I'm not in the physical book
13 market. So I'm very concerned about that.

14 Thirdly, I'm concerned that I realize that even if I
15 put in this requirement that says all the resellers need to go
16 to an agency model, how can I enforce it? And so I look at
17 Amazon, Barnes & Noble, they are the largest providers of money
18 to these six major publishers. And I'm thinking, okay, let's
19 say they're even willing to agree to this. Let's say I'm
20 willing to ignore the first two issues that I just described.
21 If at the end of the day they don't sign the deal, what's my --
22 what do I do?

23 Q. Sign what deal.

24 A. Sign a deal that moves them to agency. Sorry.

25 So if the other providers don't sign deals that moves

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Cue - cross

1 them to agency, then what do I do? At that point they were not
2 able to do that. I've got a deal that says they're supposed
3 to. And I said, in a legal agreement, I can't force Barnes &
4 Noble and Amazon to sign into an agency deal.

5 And so, as I'm talking about this and thinking about
6 this, this doesn't make sense. And so I'm starting to look at
7 this and saying wait a second I think I was pretty smart here
8 in that if I move all the resellers to agency I'm going to be
9 competing on equal footing, but I realize I'm not that smart,
10 I've made a mistake, and I need to kind of shift and think of
11 something else.

12 And so I have to come up with another idea other than
13 this because this isn't going to, you know, create the effect
14 that I need.

15 Q. Another idea for what and what was the effect that you
16 needed?

17 A. The effect that I wanted is to be able to compete on price.
18 Because that's the thing that I didn't control.

19 In the agreement I was going to force them to give me
20 all their books. I wasn't going to sign an agreement that
21 didn't force them to give me all their books. So that I knew I
22 would be able to accomplish.

23 I knew that I could, you know, I was going to put
24 price tiers that prevented them from going to very high prices
25 and gave them flexibility as they said they wanted to be able

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Cue - cross

1 to go to lower prices. But, if they put all my books at 12.99
2 or 9.99 or 7.99 for that matter and those other competitors,
3 Barnes & Noble and Amazon, were able to price books much
4 cheaper than that, for whatever deals they had -- and as I said
5 I viewed that there were lots of possibilities for that -- how
6 would I be able to do that?

7 And I wouldn't be able to do it. Because in an agency
8 model I don't get to set the price. So I have to come up with
9 a way that allows them to set the price but yet gives me the
10 ability of changing that price if I need to compete. And so
11 that's kind of the -- what's going through my mind at this
12 point of trying to figure this out.

13 Q. Was that your goal to ensure that you don't get undercut on
14 price on the market -- in the marketplace in coming up with the
15 all resellers to agency idea?

16 A. It was.

17 Q. Now let me -- you gave three reasons why you concluded that
18 that idea didn't work. Do you remember that?

19 A. I do.

20 Q. You first said that the agency deal might not -- even if
21 they entered into agency deals with Barnes & Noble and Amazon
22 they might not get the same deal that you got. What did you
23 mean by that?

24 A. Well, so my deal had a 30 percent. It had the -- you know,
25 I was thinking of whatever price caps I put in place. And so

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Cue - cross

1 my concern was, well what if they give them 40 percent? What
2 if their deal gives them, you know, some type of special
3 content that I hadn't thought of, of some kind.

4 So I was worried about what type of deal they could do
5 that would be better than mine that would give customers a
6 better price or a better product than I could offer given the
7 constraints of my deal.

8 Q. And what would be -- if your goal was competitive prices to
9 consumers, how would other -- different kinds of agency deals
10 in this all-resellers concept undermine that?

11 A. Well they could have come up with different price tiers,
12 for example. And I, you know as I thought about it more and
13 more. If you have Amazon at 90 percent market share in the
14 digital space, Amazon huge in the physical book space -- I
15 don't know what percentage they have but they have a huge
16 percentage, I'm thinking well when these guys -- I just met
17 these folks and I'm trying to negotiate.

18 When Amazon comes in and negotiates, they're
19 negotiating from a position of leverage. What's leverage?
20 Well, leverage is I sell all of your digital books basically
21 today and I sell, you know, most or many of your physical books
22 today. I have a lot of leverage over you to negotiate the best
23 deal possible.

24 And as an example they might have asked for quantity
25 discounts even in that standpoint or just say, you know, look,

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Cue - cross

1 if you want to sell your books in my store given the number of
2 books that you sell, I want the price cap to be 9.99 or 7.99 or
3 whatever else it was.

4 Q. The second reason you gave was that even if let's take a
5 hypothetical, Random House, signed a reseller to new terms, to
6 the same agency terms, and Amazon and Barnes & Noble was huge
7 reseller of books and -- was that the same point you just made?

8 A. No. It's slightly, it's a little bit different in that
9 respect. Because let's say for example that they came up with
10 the exact price tiers that we had and they had a 70/30 split.
11 You'd say well the deals are alike. I've got the same deal
12 that they do.

13 But at that point now I'm also worried about: Are
14 they getting a better deal, for example, because they give them
15 a larger percentage on the physical books? Because they have
16 that relationship with them.

17 So they could have tied the two agreements together
18 and said okay well we're going to make this agreement sort of
19 look like ours on the terms but it actually has more because it
20 has businesses that we're not in.

21 So I was worried about any kind of physical tie to the
22 agreement that we don't have anything in our physical agreement
23 and so you could say that the agency deal was the same and what
24 were the effects of that.

25 Q. What were you concerned the effects could be in that

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Cue - cross

1 scenario in terms of Apple's goal of offering competitive
2 prices to consumers on its bookstore?

3 A. Again, it goes to if the agreement sort of looks at the
4 highest level the same, but they're able to use that book piece
5 of it as leverage to either get content that was unique to them
6 or different from that standpoint or features that were unique
7 to them or different, for example, audio, added to that, then I
8 wasn't competing. The product could change on me and I
9 wouldn't be able to compete with that.

10 Q. Finally, your third point was even if I put in that
11 requirement that all resellers go to agency, how can I enforce
12 it. What did you mean by that?

13 A. Well, so my view in a legal agreement is I could put in a
14 legal agreement that says you have to, you know, the deal that
15 you do with others -- this was my thinking at the time -- the
16 deals that you do with other resellers needs to be an agency
17 deal, thinking it would be the same as us.

18 But, in an agreement I can't force the other party to
19 sign that deal. And so what would happen in that case is that
20 if the deal wasn't signed by the other party you could say well
21 the agreement is in breach or in violation. But what's my --
22 what can I do about it?

23 So at this point now let's say that they weren't
24 successful at getting the other parties to sign into an agency
25 model, forgetting about my other two issues, and they didn't

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Cue - cross

1 get them to sign, and I've got a legal agreement that says that
2 they have to get them to sign. So I can sue them. I can do
3 what?

4 And so at this point now I'm not competing on price
5 and I have no ability to do anything based on the agreement
6 that I have.

7 Q. And what, if anything, did those concerns, as you've
8 described them -- withdrawn.

9 How, if at all, did those concerns impact the
10 all-resellers-to-agency idea that you put in your January 4
11 proposal?

12 A. Well at that point we decided well this doesn't accomplish
13 our goal. Our goal of competitive pricing is not -- isn't
14 going to be accomplished by this. And so we forgot about it.
15 We said this -- this -- it's irrelevant. It doesn't help.

16 Secondly, as I said, there were -- and it sort of
17 helped the whole situation. There were publishers that had
18 said we'd prefer to have a dual model and so we knew that it
19 was going to be problematic anyway.

20 But the primary reason is, as I said, was that. So
21 now we start thinking, okay, given I want competitive pricing,
22 how can I accomplish that in an agreement? And that's where
23 the MFN language comes in.

24 So we decided, okay. Well if what I care about is
25 competitive pricing and what I want to do is I want to say: I

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Cue - cross

1 don't care at all what deals are cut, whether they're agency
2 models, wholesale models or physical and digital together, any
3 combination, or any new deal I hadn't even thought of at that
4 point, what I care about what's the end consumer paying?
5 Because that's the thing I don't control on an agency model.
6 On an agency model, the publisher controls that.

7 Kevin was very instrumental in helping. This is a
8 discussion that we're having and trying to figure out solutions
9 for this.

10 Q. I'm just going to ask you, you're referring to Kevin Saul?

11 A. Yes. Kevin Saul is my counsel and somebody I've worked
12 closely with across all of the deals.

13 Q. I'm just going to counsel you just not to reveal private
14 lawyer-client conversations that you might have had but you can
15 continue.

16 A. And so we're trying to come up with a concept. And so the
17 idea was great. So if I care about the end-user price, then
18 why don't I get an MFN in the agreement that says you, the
19 publisher, can set the price up to the tiers that I've set but
20 if there are others in the market that are able to price lower,
21 for whatever reasons, whether they have a better agency deal
22 than I do or whether they have a better wholesale deal than I
23 do, then I get that price in my deal.

24 And so I felt great about that. I thought that was a
25 really smart idea on our part because it let us compete in a

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Cue - cross

1 model where I didn't have the say on price.

2 Q. Now, I want to direct your attention to paragraph 65 of
3 your declaration which counsel showed, and direct your
4 attention to your direct testimony where you testified "A few
5 weeks before I sent my proposal to the publishers, my in-house
6 lawyer, Kevin Saul, had developed an idea for a price matching
7 Most Favored Nation clause that would protect Apple's ability
8 to compete on prices."

9 Is that your testimony?

10 A. It is.

11 Q. And there was some discussion about the word "developed"?

12 A. Yes.

13 Q. What, if anything, do you recall about when -- and I'm
14 asking about the development, not the writing of the
15 language -- when Mr. Saul developed the concept for a retail
16 price facing MFN in connection with a potential agency deal?

17 A. I think, as you can see from the first term that I sent
18 them, we were always worried about how we can compete. We came
19 up with this idea of saying move them all to a reseller model.
20 But it was a discussion that I was already having trying to
21 figure out a way.

22 At that point we're having discussions. And sort of
23 those things lead to the issues that I just started describing.

24 Kevin, at that time same time, is thinking about those
25 and coming up with a different idea, which was the MFN. And so

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Cue - cross

1 he started on it at that time and had those ideas and it was
2 during the holiday break. We sort of talked about it very
3 infrequently. If he was working on it, I didn't know what it
4 was yet. We weren't working on a day-to-day basis during the
5 holiday break.

6 And then when we came back on the week of June 4 --

7 Q. January 4?

8 A. January 4. We really sat down and kind of filled it all in
9 and were able to come to a very concrete and specific proposal.

10 Q. Now, there was a question about whether Apple ever had a
11 retail price facing MFN in other content deals and I think you
12 said to your knowledge no, correct?

13 A. That's correct.

14 Q. And why is that, sir? Why in the iTunes store, in the app
15 store, do you not have retail price facing MFNs?

16 A. Well, when we entered those markets there was no competitor
17 who was dominant. And so we entered into a market where we
18 were -- there weren't very many music publishers or -- sorry
19 music stores. There were no TV stores or movie stores. The
20 app store, there were no app stores at that time. And so we
21 were the -- we were entering markets where there was no other
22 competitor. So I wasn't worried about that because I thought I
23 could lead the market.

24 In this particular case, I was dealing with a party
25 who, to me, seemed to control and have a huge piece of the

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Cue - cross

1 market. And so I was very worried that I would be able to
2 compete with them.

3 Q. Now, counsel showed you paragraph 58 of your declaration as
4 well where you testified on direct examination that Apple cared
5 about two things.

6 And counsel then asked whether you cared what model
7 other publishers were on with other retailers once you had the
8 MFN, and you said you didn't.

9 Why did Apple, once it settled on the MFN, not have an
10 interest in what the business relationship was between a
11 publisher and any of its other retailers?

12 A. Because we structured the MFN on purpose to have nothing to
13 do with any type of agreement, wholesale, agency, combined, as
14 I said, anything else that I can think of. We structured it
15 completely on what the end-user price was.

16 And so I didn't care at all what type of deals the
17 publishers got or didn't get from Amazon or Barnes & Noble or
18 anybody else. I knew that if Barnes & Noble or Amazon were
19 able to negotiate a better deal than I had from a consumer
20 price point, I would get it as part of that MFN.

21 Q. Now you were asked the following question -- I think I
22 wrote it down right -- and gave the following answer on
23 cross-examination. You were asked: Isn't it true, sir, that
24 what actually happened was that Apple realized that it
25 couldn't -- I'll withdraw the question because I can't read

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Cue - cross

1 that one word.

2 You were asked whether, in fact, what really happened
3 was that Apple realized that moving all resellers to agency was
4 illegal and just then swapped out the MFN for that idea to
5 achieve the same purpose.

6 Do you recall a question to that effect?

7 MR. BUTERMAN: Objection.

8 THE COURT: Well, I would have sustained it except "to
9 that effect." In sum or substance were you asked something
10 along those lines? Do you remember that?

11 THE WITNESS: I do, your Honor.

12 Q. And I know what your answer was -- even though I can't read
13 one word in my notes -- it was: No, that's not true. Do you
14 recall that?

15 A. I do.

16 Q. And can you tell the Court why it's not true that the MFN
17 was designed to accomplish moving all resellers to agency?

18 A. Well as I said before, we did the MFN for the purposes of
19 being able to compete on price. And so when it didn't
20 accomplish that, I did substitute it for -- sorry. We created
21 the -- let me go back because I think I said the words wrong.

22 We created the move to all agency as a way to compete
23 on price. When I felt that that didn't get accomplished, I
24 substituted that and said well that doesn't get me what I want
25 so get rid of it. And I put something in place that I thought

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Cue - cross

1 got me what I want.

2 Q. Right. And why wasn't that put on the table in
3 negotiations to achieve the same purpose of moving all
4 resellers to agency?

5 A. Sorry.

6 Q. Was the MFN simply another way for Apple to achieve the
7 purpose of moving Amazon, Barnes & Noble, and other retailers
8 to an agency model?

9 A. No. It's not.

10 Again, the MFN has nothing to do with whether you're
11 on an agency model or any other model. That wasn't the goal.
12 It wasn't -- it's not something we contemplated from that
13 viewpoint as this is going to, you know, guarantee us that it's
14 going to force it. It didn't matter to us. That's not what
15 I'm thinking.

16 What I'm thinking is does the MFN give me competitive
17 pricing irrespective of whatever models Amazon, Barnes & Noble,
18 or anybody else is in.

19 Q. And how if at all, sir -- if you were to say it simply,
20 what was your thinking behind the MFN? What was your overall
21 thinking behind proposing an MFN?

22 A. It lets me compete on price so that I can set the best
23 price for the consumer.

24 Q. And when you say set the best price, have you heard the MFN
25 referred to as a price parity provision?

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Cue - cross

1 A. I have.

2 Q. Or a price lowering mechanism?

3 A. I have.

4 Q. And how, if at all, is the MFN a price lowering mechanism
5 as you understood it in January of 2010?

6 A. Well if I was selling a book, for example, at 12.99 and I
7 found another reseller that was selling books at those -- those
8 same books that I was selling at 12.99 or 9.99 or 7.99 for that
9 matter and they were selling them at a lower price than what
10 our store was selling them at, then I would get the opportunity
11 of changing the price automatically to that lower price that
12 the other reseller was selling it at.

13 So it allowed me to take the price of the book and
14 lower it to a new price without requiring the publisher to do
15 it. The MFN did that for me.

16 Q. I want to direct your attention to -- one moment, your
17 Honor -- to Defendant's Exhibit 140.

18 Do you recall --

19 A. One second. Sorry.

20 I'm sorry. I don't have a 140. Did you say 1-4-0?

21 MR. SNYDER: Yes. I'll hand that one up as we're
22 getting the books. Thank you. Apologies.

23 THE WITNESS: Thank you.

24 Q. Do you recall, sir, being shown this document and comparing
25 it to your declaration, your direct testimony?

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Cue - cross

1 A. I do.

2 Q. And can you tell the court what this document is.

3 A. Yes. Keith Moerer, who works for me and was helping me on
4 the deal, had received a call from Madeline McIntosh who was
5 kind of the number two person under Markus Dohle. And she had
6 talked to him and had a bunch of questions. And he was giving
7 me an update on the questions and what he answered.

8 Q. At the time of all of the six major publishers which one,
9 if any, was there one that was most important to you in terms
10 of a potential partner?

11 A. Random House was the most important because they were the
12 largest.

13 MR. SNYDER: If we can go to the calendar, please.

14 Q. So, this e-mail is dated January 10, correct?

15 A. That's correct.

16 Q. And you sent your initial all-resellers-to-agency proposal
17 idea on the 4th and 5th to the different publishers; is that
18 correct?

19 A. That's correct.

20 Q. By the way, sir, do you recall that on or around the same
21 date that you sent to Penguin an agency proposal including the
22 all-resellers-to-agency idea, Penguin was sending to Apple a
23 draft wholesale agreement?

24 A. I don't recall.

25 Q. Are you certain, sir, that you never met with Penguin

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Cue - cross

1 during the holiday season?

2 A. I definitely didn't meet with Penguin during the holiday
3 season.

4 Q. Now, counsel directed your attention -- so my question
5 was -- so this e-mail is on the 10th. Can you tell the Court
6 when between the 4th and the 10th you made the decision that
7 you've described in some detail to abandon the
8 all-resellers-to-agency idea in favor of a retail price facing
9 MFN?

10 A. Yeah. On the 4th when I sent the e-mail out to the
11 publishers, I sent them sort of the key terms. And I asked
12 that I wanted to set up a meeting to call them and have a
13 conversation so I could walk through the terms and get an idea
14 of some feedback from them.

15 At this point, we were struggling, as I mentioned,
16 with the concept. And I'm talking to Kevin and trying to come
17 up with a way to address my concerns. And so we come up with
18 the idea of this MFN and realize that even on the 4th, after
19 I've sent it and I want to schedule the calls, I decide not to
20 go ahead and schedule them because I find that I really don't
21 know exactly what I'm going to ask for yet.

22 Q. So let me just ask you. You come back from vacation and
23 it's the 4th and what -- if we can look again at the
24 all-resellers e-mail to see what time you sent it out.

25 A. It was at 9:16 in the morning. I have it in front of me.

D6d9usa6

Cue - cross

1 Q. What time do you generally get into the office?

2 A. About 9:00.

3 Q. Is it fair to say that one of the first things you did when
4 you got back from vacation was send this proposal out?

5 A. It is.

6 Q. And did you testify that initially you -- because time was
7 urgent, you had hoped to meet in New York that week with the
8 publishers?

9 A. I wanted at least to have a phonecall with them if I
10 couldn't meet with them in person. But as soon as I sent the
11 proposal I wanted to get some feedback. I wanted to understand
12 where we were.

13 Q. And why didn't you, after the 4th, 5th, 6th, 7th,
14 8th, 9th, 10th, why didn't you have the same series of
15 calls with the publishers that you had in December?

16 A. Because I realized that I didn't want to ask them for the
17 all resellers going to agency and I needed to do something
18 else. And so here's where we're formulating this MFN. And so
19 I decided why am I going to have a call with them if I don't
20 really know what I'm asking for yet.

21 Q. And when -- I'm sorry. Were you finished?

22 A. So I decided not to make the phonecalls to them.

23 Q. And when was the next time that you or your team met with
24 the publishers in the month of January, do you know?

25 A. Well, after we had come up with the MFN idea, I decided

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Cue - cross

1 that in the interests of time, that time point now I'm feeling
2 pretty good. I think we've got price tiers. I think we've got
3 this MFN language. We've got the agency model for us. So I
4 think I've got what feels to me like a deal that I want to get
5 done.

6 And so I decided to get a draft agreement to the
7 publishers so that they would have that, so instead of sending
8 a term sheet and wasting the time of going through that, they
9 could get the whole agreement.

10 So on -- I told Kevin, working with Kevin to get me an
11 agreement by that weekend so that I could send it out on the
12 11th.

13 And so I sent them an agreement. And I believe it was
14 the 11th. But I don't -- I don't remember the exact date.
15 But it's early that week I sent them the agreement.

16 Q. And I think counsel will agree that the agreement was sent
17 out on the 11th, but just assume hypothetically it was sent
18 out on the 11th, how many days did Apple have to consummate;
19 that is, get executed agreements in order to include a
20 bookstore on the iPad?

21 A. Well in my mind I had set a date of the 21st, in my mind
22 that we had to get the deal signed. Because if you're familiar
23 with one of our events for launching a product, we send out
24 invitations. It's a major event at a location. Steve gets up
25 on stage. He presents it. He gives it a demo. And so it

D6d9usa6

Cue - cross

1 takes a lot of preparation to get to that event.

2 And so I decided that if we didn't have it on the
3 21st, in talking to Steve, he would have to pull it out of
4 his slides. And pull the demo out. And so I needed to give
5 him some time to be able to do that if I wasn't going to
6 succeed.

7 Q. And in terms of Mr. Jobs' preparation for his launch
8 announcements, can you give the Court some sense of why if the
9 announcement was on the 27th you set a deadline of the
10 21st?

11 A. Well so Mr. Jobs is working on a slide presentation. His
12 slide presentations at an event run in the many, many hundreds
13 of slides. He gives live demos. They are generally well over
14 an hour long. They are really important. It's the first time
15 we make -- we show the product.

16 And so Steve works on that for weeks ahead of time.
17 And so at this point in time on the 11th he's already working
18 on his slides. He's already thinking about what he wants to
19 demo. We're providing him, you know, screen shots of what the
20 bookstore is going to look like. We're providing him screen
21 shots of what they reader is going to look like. So sort of
22 the train has left the station.

23 So if I got to sort of stop the train, I felt like if
24 I didn't do this by the 21st, then it was going to put Steve
25 in a very difficult position because he was going to be left

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Cue - cross

1 with slides in there that he was rehearsing, practicing in his
2 mind getting ready for that may or may not happen.

3 Q. Now, let's go back, please, to Defendant's Exhibit 140,
4 which is an e-mail -- and if we have the calendar side by
5 side -- that Mr. Moerer wrote to you on a Saturday; is that
6 correct?

7 A. That's correct -- it's correct.

8 Q. And then you respond on Sunday; is that correct?

9 A. That's correct.

10 Q. And if we can direct your attention to number 2 where
11 Mr. Moerer writes, "Are we willing to accept an agency model if
12 other retailers continue a standard wholesale model for new
13 releases without holdbacks?"

14 And Mr. Moerer answers, "No."

15 You then write, "We are (I don't think we can legally
16 force this). What we care about is price. So the contract
17 will say we get it at 30 percent less whatever the lowest
18 retail price out in the market is, whether agency or
19 wholesale."

20 Did I read that correctly?

21 A. You did.

22 Q. I want to take you through your response, sir, carefully.

23 You wrote, "We are." What did you mean by we are?

24 A. Apple, Steve, myself.

25 Q. You are what?

D6d9usa6

Cue - cross

1 A. We are okay with accepting an agency model for us if other
2 retailers continue in a standard wholesale model for new
3 releases without holdbacks.

4 Q. You then wrote in parenthetical "I don't think we can
5 legally force this."

6 Do you see that?

7 A. I do.

8 Q. What did you mean by that?

9 A. Again, as I said, I could put it in the agreement but I
10 couldn't legally force the other retailers to sign that
11 agreement.

12 Q. To sign which agreement?

13 A. Sorry. I could put it in our agreement that they -- book
14 publishers had to sign the other retailers to an agency model
15 but my agreement can't force them to do that. And so I was
16 basically making this doesn't work.

17 Q. Now, just for the record doesn't work to accomplish what?

18 A. It doesn't work to maintain the price competitive nature
19 that I wanted for our store.

20 Q. You then write "What we care about is price."

21 What did you mean by that?

22 A. What I care about is the consumer price.

23 Q. And when you wrote "What we care about is price," what, if
24 anything, were you inferring you don't care about?

25 MR. BUTERMAN: Objection.

D6d9usa6

Cue - cross

1 MR. SNYDER: Withdrawn.

2 Q. You see the use of the words "what we care about"?

3 A. I do.

4 Q. In the use of those words, did you intend to convey that
5 you cared about one thing but not another thing?

6 A. I was saying what I care about is the price. I don't care
7 about whether the retailers continue in a standard wholesale
8 model for new releases which is the question that Keith -- or
9 that Madeline was asking Keith.

10 Q. You go on to write, "So the contract will say we get it at
11 30 percent less whatever the lowest retail price out in the
12 market is."

13 Do you see that?

14 A. I do.

15 Q. What contract are you referring to?

16 A. The contract that Kevin and I were working on that we
17 hadn't sent yet, that we sent out on the 11th.

18 Q. Then you wrote "Lowest retail price out in the market."

19 What market were you referring to?

20 A. The eBook market, anybody who had a store that was selling
21 eBooks.

22 Q. Then you wrote in parenthetical, "Whether agency or
23 wholesale."

24 What did you mean by that?

25 A. Again, if that retailer was on an agency model or a

D6d9usa6

Cue - cross

1 wholesale model with the publishers it was irrelevant. I
2 didn't care whether -- it didn't apply.

3 Q. Do you know whether at any point in time -- withdrawn.

4 Do you know why Keith wrote "no" when you wrote "we
5 are"?

6 A. I do.

7 I didn't expect -- since I sent the term sheets to the
8 publishers and I said I would call them, I was working with
9 Kevin. Now at this point I had decided that I didn't want to
10 talk to the publishers because I didn't know what I really
11 wanted from them yet.

12 I didn't communicate with Keith at this point because
13 Kevin and I are working on the agreement itself. And so Keith
14 wasn't aware that I had already moved on from this agency
15 model. And Random House and Madeline called him, unbeknownst
16 to me. And so at this point he wasn't aware of it. And so I
17 was just trying to make him aware in this e-mail of the change
18 that Kevin and I had already done in the agreement.

19 Q. Let me show you Defendant's Exhibit 169. This is a --

20 A. Thank you.

21 Q. This is an e-mail, sir, internal from Random House that's
22 in evidence in this case from Amanda Close to Madeline McIntosh
23 and others.

24 A. I'm sorry. Which number was it?

25 Q. I'm sorry. Defendant's Exhibit 140 -- 169.

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Cue - cross

1 A. One second, sorry. The binder just opened on me here.

2 Q. I'll direct your attention to the third numbered paragraph
3 Ms. Close writes to Madeline McIntosh, Markus Dohle and others,
4 "Is Apple willing to consider an agency model for Random House
5 even if no other retailers also convert to agency? Yes, but
6 they expect to be treated the same way that retailers are
7 treated." And then in handwriting, "(Consumer price?)"

8 Do you see that?

9 A. I do.

10 Q. To your knowledge did -- is this consistent with your
11 recollection that at some point Mr. Moerer informed Random
12 House that Apple was okay with Random House staying on
13 wholesale with other retailers and going to agency with Apple?

14 A. Yes. That's why I responded to Keith, since he had those
15 questions, I wanted to make sure that he had the answers so
16 that when he went back to Madeline he could communicate that.

17 Q. Now let's go back to the calendar, please. And -- that was
18 Sunday the 10th, correct?

19 A. Correct.

20 Q. And what happened in connection with the negotiations the
21 week of the 10th? Do you recall?

22 A. Again, I sent the agreements to the publishers on the
23 11th. My first thought was to get on a plane and go -- start
24 the negotiations. But I figured an agreement that was being
25 sent was going to be either the general counsel, the other

D6d9usa6

Cue - cross

1 business folks in these publishers would want to kind of look
2 through it, try to understand it. And so I decided that the
3 best course of action was to send Keith during the first few
4 days so that he would be able to talk to the publishers, not
5 generally the CEOs because I didn't expect them, but all of the
6 business folks, to answer any questions that they had on the
7 agreement, so that by the time I got there I would be prepared
8 with what, if any, issues they had. And I would be able to
9 address those quicker by knowing what they were.

10 Q. Let's look at Defendant's Exhibit -- Plaintiffs' Exhibit
11 for a minute, side by side, please. 788.

12 Again, I want you to take your time, sir, and tell the
13 Court whether the week of the 10th you had a -- any calls
14 with any of --

15 A. Sorry. Which number again?

16 Q. I'm sorry?

17 A. Which number again?

18 Q. 788. It's in the plaintiff -- the government's binder?

19 A. Yes.

20 Q. You know the five publishers that signed agency agreements
21 by name, of course, sir?

22 A. I do.

23 Q. And did you have conversations the week of the 10th with
24 a single publisher with which Apple ultimately signed agency
25 agreements?

D6d9usa6

Cue - cross

1 A. I did not.

2 Q. Did you have a two-minute conversation with Markus Dohle
3 that week?

4 A. I did.

5 Q. Now, the week of January 11th, in preparation for your
6 testimony today did you have an opportunity to review e-mails
7 and other materials to refresh your recollection about what you
8 did that week?

9 A. I did.

10 Q. And can you tell the Court what you did on
11 January 14th in connection with eBooks.

12 A. I had set up a meeting a few weeks back with Mr. James
13 Murdoch from Fox. Mr. John Miller from Fox. Mr. Peter
14 Levinsohn from Fox. And I should say -- I apologize. Let me
15 get their companies right. James Murdoch and John Miller were
16 at News Corp. Peter Levinsohn was at Fox, which is a
17 subsidiary of News Corp. With Mr. Jobs and myself.

18 Mr. Murdoch wanted to meet us. We had never talked to
19 him. He was running Europe at the time. And he wanted to come
20 in and talk about how we could do more business together and
21 how our businesses were going together.

22 Q. Where did that meeting take place?

23 A. It took place in Apple in Cupertino in the boardroom of
24 Steve's building.

25 Q. Do you have a picture of that meeting?

D6d9usa6

Cue - cross

1 A. I'm sorry?

2 Q. Do you have a mental picture of that meeting?

3 A. Yes, I do.

4 Q. Do you have a photograph of it too?

5 A. No pictures in the boardroom. Kind of like the courtroom.

6 Q. Did -- what was the general purpose of that meeting?

7 A. Again, Mr. Murdoch kind of wanted to talk to us about the
8 businesses that he saw News Corp. as a company going forward
9 with, and how Apple could help, how we could partner and do
10 more things together.

11 And in addition to that, we took advantage of that and
12 wanted to talk about books because HarperCollins was a
13 subsidiary owned by News Corp.

14 Q. And at the time, to your knowledge, did Steve Jobs have a
15 prior relationship with James Murdoch of any kind?

16 A. No. He had never met him. And I knew that because I
17 had -- I had arranged a meeting and Steve had told me that he
18 had not met him.

19 Q. All right. Now, just very briefly can you describe for the
20 Court the other business relationships in general terms between
21 News Corp. on the one hand and Apple on the other as of
22 January 14, 2010.

23 A. We sold their movies and rented their movies from Fox. We
24 also sold their TV shows. They were -- we were a large
25 advertiser in their TV networks. They were interested in

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Cue - cross

1 bringing their news products as they had apps. And so they
2 were interested in becoming a news supplier to the IOS
3 platform.

4 A lot of different relationships between us. They
5 used a lot of our equipment. They used Macs. They used
6 iPhones.

7 Q. Did you have an understanding, sir, as of January of 2010
8 that the relationship between News Corp. and Apple was
9 important to News Corp.?

10 A. I would hope it was. I thought it was.

11 MR. SNYDER: Your Honor, I'm about to go to a series
12 of four documents but I think if I do that you will be unhappy.

13 THE COURT: I'd be thrilled, but it is 5:00.

14 MR. SNYDER: Thank you, Judge.

15 THE COURT: Good. Thank you.

16 We'll see you Monday morning, 9:30.

17 THE WITNESS: Thank you, your Honor.

18 THE COURT: Yes. And you can step down, Mr. Cue.

19 THE WITNESS: Okay. Sorry.

20 THE COURT: Thank you. No problem.

21 (Witness excused)

22 Yes. Mr. Buterman.

23 MR. BUTERMAN: Your Honor, a few moments ago
24 Mr. Snyder elicited testimony from the witness indicating that
25 in preparation for his testimony Mr. Cue reviewed e-mails and

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Cue - cross

1 other materials to refresh his recollection. We believe under
2 Rule 612 we're entitled to all of those materials.

3 MR. SNYDER: May I be heard, your Honor? I think I
4 can clear it up pretty quickly.

5 THE COURT: You know what I'm going to do.

6 MR. SNYDER: We will talk about it and solve the
7 problem.

8 THE COURT: Yes. Well, you will talk about it. I
9 will hope you will solve it.

10 MR. SNYDER: We do better on the weekends than we do
11 during the weekdays.

12 THE COURT: I want to let you talk about it today and
13 if you don't solve it today then I'm around tomorrow. Because
14 I think if there is material to be shared it should be shared
15 over this weekend.

16 MR. SNYDER: Yes, your Honor. We agree.

17 THE COURT: Okay. Good. Thanks so much.

18 So counsel I think the government used 3 hours today
19 or close to it. And Apple used 2 hours and 35 minutes. So I
20 think we're still on schedule as we expected to be.

21 Are there any other issues we need to address before
22 breaking for the weekend?

23 MR. RYAN: No, your Honor.

24 MR. SNYDER: No, your Honor. Thank you.

25 THE COURT: Thank you. Have a good weekend everyone.

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Cue - cross

(Adjourned to June 17, 2013 at 9:30 a.m.)

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2811638

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